JUL 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2062

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioners

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHARLES A. HOBBS
Counsel for Petitioners
1735 New York Avenue, N.W.
Washington, D. C. 20006

WILKINSON, CRAGUN & BARKER
DONALD C. GORMLEY
JERRY C. STRAUS
PATRICIA L. BROWN
Of Counsel

July 22, 1974

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3-11
Reasons for Granting the Writ	11-14
Conclusion	14

Appendices

A. Order, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Ct.Cl. App. No. 17-72, March 29, 1974	1a
Concurring opinion of Judge Nichols	3a
Denial of Motion for Rehearing, May 31, 1974	6a
B. Opinion, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 28 Ind. Cl.Comm. 264 (1972)	1b
C. Opinion, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 390 F.2d 686 (1968)	1c
D. Opinion, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 16 Ind. Cl.Comm. 342 (1965)	1d
E. Act of June 1, 1910, 36 Stat. 455	1e

TABLE OF AUTHORITIES

Cases Page

Armstrong v. *United States*, 364 U.S. 40 (1960) . 5
Big Eagle v. *United States*, 323 F. Supp. 60 (D.S.D. 1971) 13
Chippewa Indians v. *United States*, 301 U.S. 358 (1937) 7
Ft. Peck Indians v. *United States*, 132 Ct. Cl. 373, 132 F. Supp. 222 (1955) 7
Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) 7, 12
Monongahela Nav. Co. v. *United States*, 148 U.S. 312 (1893) 5, 12
Raylaine Worsteds, Inc. v. *United States*, 137 Ct. Cl. 54, 146 F. Supp. 723 (1956) 11
Shoshone Tribe v. *United States*, 299 U.S. 476 (1937) 5, 7, 9, 12
Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, 16 Ind. Cl. Comm. 342 (1965) ..... *passim*
Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968) ..... *passim*
Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, 28 Ind. Cl. Comm. 264 (1972) ..... *passim*
Three Affiliated Tribes of the Fort Berthold Reservation v. *United States*, Ct. Cl. App. No. 17-72, March 29, 1974 ..... *passim*
United States v. *Klamath Indians*, 304 U.S. 119 (1938) 5, 9, 12
United States v. *Shoshone Tribe*, 304 U.S. 111 (1938) 9

Statutes

Act of June 1, 1910, 36 Stat. 455 ..... *passim*
28 U.S.C. § 1255(1) 2
Fifth Amendment, U.S. Constitution ..... *passim*

Miscellaneous

Moore, *Federal Practice* (1965) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ———

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioners

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Three Affiliated Tribes of the Fort Berthold Reservation ("the Tribes") respectfully petition for a writ of certiorari to review a judgment of the United States Court of Claims.

OPINIONS BELOW

This case has been the subject of four prior decisions as follows:

(a) The memorandum order of the Court of Claims, on which the writ is sought, is not yet reported: *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, Ct. Cl. App. No. 17-72, March 29, 1974;

(b) *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 28 Ind. Cl. Comm. 264 (1972);

(c) *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968);

(d) *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 16 Ind. Cl. Comm. 341 (1965),

These opinions are reproduced as Appendices A, B, C and D to this petition.

JURISDICTION

The order of the Court of Claims of which the Tribes seek review was entered on March 29, 1974. The Court's order denying the Tribes' motion for rehearing was entered on May 31, 1974, see Appendix 6a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether Indians, whose property is unilaterally taken by act of Congress for public purposes, are entitled to just compensation under the Fifth Amendment of the Constitution, or whether, as the Court of Claims held, they, because they are Indians, are limited to a lesser form of compensation.

2. Whether Congress can be acting "in good faith" as trustee of a tribe when it unilaterally sells the tribe's land to settlers at giveaway prices, land the tribe badly needs to support its ranching economy.

3. Whether it is a denial of Due Process for an appeals court to draft a new and unprecedented test of just compensation, without giving the appellants an opportunity to produce evidence to show that the facts of their case meet the new test.

STATUTES INVOLVED

Act of June 1, 1910, 36 Stat. 455 (reproduced as Appendix E).

The Fifth Amendment to the Constitution of the United States, which reads in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

The 1910 Act

This claim arises under the Act of June 1, 1910, 36 Stat. 455, and supplemental legislation, under which the United States, without the consent and in disregard of the desires and needs of the Fort Berthold Tribes, opened the northern half of the Fort Berthold Reservation to public settlement. The Act granted some of the opened land to the State of North Dakota for an arbitrary fixed price; granted one parcel to a church without any compensation to the Tribes; took one parcel for a national monument; and provided that the balance of the opened lands be sold off to settlers under the homesteading laws, with the proceeds to be credited to the Tribes. The prices paid by the settlers for the homestead lands were based on an appraisal system set up by Sec. 7 of the Act, a system which turned out to be heavily biased in favor of the settlers, as shown by the fact that, as the Indian Claims Commission found, 28 Ind. Cl. Comm. at 278, App. 13b, the prices set by the commission and paid by the settlers were only about a *third* of the true fair market value of land in that area at that time.[1] Virtually all of

[1] The pro-settler bias may well have been due to the fact that the Act (Sec. 7) placed a representative of the settlers on the

the 1910 homestead parcels were sold within approximately a year of their opening date, an indication of both the high settler demand for the land and its bargain price. 16 Ind. Cl. Comm. 355. The Tribes consented to none of this.

The Tribes have been awarded just compensation for the land given to the state, the church, and the national monument. They seek review only of the Court of Claims' decision denying just compensation for the land given to the settlers.

The Homestead Provisions Were a Taking

The purpose of the homesteading laws was to encourage the population and agricultural development of the western frontier by providing cheap land to settlers on terms which allowed them to finance their property through the income they earned from working the land. Because the 1910 Act was a supplement to the homestead legislation, it contained many provisions designed to help the settlers which, as it happened, were at the expense of the Tribes. These included out-and-out donations of some of the land and some of the sale proceeds to the local white communities for such purposes as schools and parks (Sec. 6); the settlers paid in installments without interest to the Tribe (Sec. 9); the Tribes were charged for all selling and surveying costs (Sec. 12); and of course the pro-settler appraisal system mentioned above cost the Tribes dearly.

The 1910 Act effectively and unilaterally deprived the Tribes of a large portion of their reservation in fulfillment of a public purpose, *viz.*, making cheap land available to the immigrants then pouring into the country. Under the precedents established by this Court, all of

---

appraisal commission (the other members of the commission were an Indian and a BIA employee).

the elements are present for a taking for which the Tribes are entitled to just compensation under the Fifth Amendment to the Constitution. *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312 (1893); *Armstrong* v. *United States*, 364 U.S. 40 (1960); *United States* v. *Klamath Indians*, 304 U.S. 119 (1938); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937).

The Court of Claims' 1968 Opinion Was Wrong and Should Be Set Aside

The Tribes have recovered a judgment of $2,765,067 for the true net value of their homestead lands[2] as of the times they were sold. However, they were denied the interest which just compensation awards to one whose property is taken under the Fifth Amendment, because the Court of Claims held in its 1968 opinion that the homestead lands were not "taken" in the Constitutional sense.[3] The Court found that the ordinary rules governing what constitutes a Fifth Amendment taking do not apply in the case of Indian tribes, because of the government's special trust relationship to the tribes. Rather, the court devised a totally new and unprecedented "good faith effort" test, by which it intended to distinguish acts of trust management of Indian property from sovereign condemnation of Indian property. Under this test, property of Indian tribes is not "taken" within the meaning of the Fifth Amendment, where the government makes a "good faith effort" to pay the Indians the full value. The Court said:

---

[2] In addition, they recovered $4,840,019 in interest at 3%, this being the rate specified in the statute for the proceeds of sale after deposit in the Treasury. In addition, they recovered $1,203,971 for the loss of lands to the state, the church, and the national monument. App. 35b.

[3] If the Tribes had been awarded just compensation, their recovery would have borne interest at 5% instead of 3%, which would have added about $3,200,000 to their recovery.

> "Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee." 309 F.2d at 691, App. 8c.

The fact that the "good faith effort" may in fact completely fail to obtain fair market value, or that the purpose for which the property was taken was not to benefit the tribe but to fulfill a public objective are irrelevant under the Court of Claims' test.

In essence, the "good faith effort" test carves out an exception to the Fifth Amendment, which deprives Indians, and Indians alone, of the full protection of the just compensation clause, on the ironic basis that the government has a special fiduciary responsibility to protect Indian interests. In other words, under the Court of Claims test, it is as if the Fifth Amendment reads—

> ". . . nor shall private property be taken for public use, without just compensation, except when the property belongs to an Indian tribe, and a good faith effort is made to pay the tribe the full value of the property."

Applying its new "good faith effort" test to a record never designed to explore the good faith of Congress, the Court of Claims then proceeded to find as a fact that Congress had indeed made a good faith effort (by setting up the appraisal system) to see that the Tribes were fairly paid for their land. 390 F.2d at 694, App. 13-14c. Therefore, there was no taking. The court considered neither the purpose of the 1910 Act, nor any of its pro-settler provisions, nor its results in fact, all of which confirmed what anyone would have assumed, that while Congress did not intend to cheat the Indians, it certainly was acting for the primary benefit of the settlers,

not the Indians; hence was acting as a sovereign, not a trustee.

Instead, the court's rationale was chiefly devoted to distinguishing between two lines of cases; one which holds that Congress has plenary power over Indian properties, and the other affirming the government's obligation to pay just compensation when it takes Indian land in the Constitutional sense. The court decided that the cases could be distinguished on the basis that in those allowing just compensation, Congress had not made a "good faith effort" to transmute the Indians' property into its full money value. What the court completely failed to see was that it was dealing with parallel rather than divergent lines of authority.

There is no question that Congress has the plenary power to deal with Indian property.[4] Congress frequently exercises this power, as a trustee, to change Indian assets from one form to another for the benefit of the tribe, as, for example, selling Indian timber, and at least where there is no breach of trust responsibility, the tribe has no recourse.[5] However, Congress, as sovereign, also has the plenary power to take the property of an Indian tribe for the benefit of the public as a whole. This power is the sovereign's power of eminent domain, and applies to all private property, Indian and non-Indian alike. When Congress acts as sovereign for the public good, and not as trustee for the Indians' benefit, the Indians do have recourse, namely the right of just compensation. As this Court unanimously said in another case, where the Government gave one tribe the right to occupy part of another tribe's reservation:[6]

---

[4] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Chippewa Indians* v. *United States*, 301 U.S. 358, 375 (1937).

[5] *Fort Peck Indians* v. *United States*, 132 Ct. Cl. 373, 132 F. Supp. 222 (1955).

[6] *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497-8 (1937).

> "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564, 565, 566. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . .; for that 'would not be an exercise of guardianship, but an act of confiscation.' *United States* v. *Creek Nation*, *supra*, p. 110; citing *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307-308. . . . Spoliation is not management."

The *Shoshone* case states the law. When, under the 1910 Act, Congress unilaterally sold the Tribes' lands to settlers at prices far below their fair value in order to provide cheap land to the settlers, Congress obviously acted as sovereign, not trustee, and the Tribes are entitled to just compensation. The Court of Claims decision to the contrary should be reversed.

The Tribes Have Been Denied Due Process

Even assuming arguendo that the Court of Claims' "good faith effort" test is valid, we respectfully suggest that the manner in which it has been applied in this case raises a serious question of Due Process. This case has been the subject of two major trials (one on liability and one on valuation), and an appeal from each. It might be assumed that this proves that the Tribes' case has been thoroughly considered. But this is not true; on the just compensation issue, one of the Tribes' main points throughout the case, the Tribes were arbitrarily prevented in two different ways from having their day in court.

Law of the Case. In the first trial (limited to liability), the Commission determined that the Tribes had a compensable interest in the lands disposed under the 1910 Act. However, without any mention of the Tribes' just compensation argument, the Commission held that in order to prevail the Tribes must prove that the moneys received from the disposition of the subject lands were so far below the fair market value that the United States was "guilty of either fraudulent conduct or gross negligence amounting to a breach of its fiduciary obligations. . ." 16 Ind. Cl. Comm. 391, App. 19d. The Tribes took an interlocutory appeal,[7] disputing the failure to find a right of just compensation. Under the precedents then prevailing,[8] the only elements necessary to prove a Fifth Amendment taking were that the Indians had title and that Congress deprived them of it for a public purpose without their consent. Therefore, when the case reached the Court of Claims, the record contained merely a relatively few exhibits which tended only to show whether or not the Indians had consented to the 1910 Act itself. Neither of the parties had attempted to explore Congress's "good faith effort" to see that the Tribes were fairly paid, since obviously neither party could have foreseen the relevance of this question.

The court not only created the new test without benefit of argument by the parties, but *went on to apply it*, notwithstanding the fact that no evidence relevant to the new test had been intentionally introduced. The danger of making findings in advance of the evidence was well illustrated by what came out in the trial on remand, where the Tribes proved beyond any doubt that even under the court's new test they were entitled to just compensation. The Tribes showed that Congress

[7] As is their right under 25 U.S.C. § 70(s).

[8] E.g., *Shoshone Tribe* v. *United States*, note 6 above; *United States* v. *Klamath Indians*, note 13 below.

clearly had acted for the benefit of the settlers, and contrary to the wishes and best interest of the Tribes[9] and that the Act was so biased in favor of the settlers that pursuant to its machinery the Indians only received a third of the value of their lands.[10] In the face of this evidence, it is a gross mockery to hold, as the Court of Claims did in its 1968 opinion, before it knew what the facts were, that the 1910 sale "merely transmute[d] the property from land to money" or was a "mere substitution of assets or change of form." 390 F.2d at 691, App. 8c.

While the Commission let the Tribes' evidence into the record on remand, it refused to consider it, on the ground that it was bound by the law of the case doctrine to the Court of Claims' earlier finding that the homestead lands were not "taken" within the meaning of the Fifth Amendment. The Tribes then appealed to the Court of Claims, which affirmed without opinion.

As a result, this historic litigation has ended with a finding that when Congress sold part of the Fort Berthold Reservation to settlers at a third of its value, it acted as trustee for the benefit of the Tribes; whereas it is incontestable on this record that the Tribes' land was sold for the benefit of the settlers, and that Congress had no real concern for the Tribes' best interest.

This is an insult to history as well as Due Process, and was committed in the name of law of the case, a

---

[9] The Tribes' expert witness testified without contradiction that the lands sold to the settlers were vital to the Indians' ranching economy, and that they were disposed of over the protests of the Tribes for the benefit of white settlers and in furtherance of national homesteading policy.

[10] 28 Ind.Cl.Comm. at 278, App. 14b.

doctrine which does not require any such result.[11] The Tribes have been denied Due Process.

Denial of Rehearing En Banc. The Tribes were also denied Due Process in their efforts to show the Court of Claims that it was wrong in its 1968 appellate finding of fact that the "good faith effort" test had been met. That finding was made by an *en banc* court, at a time when the Court of Claims decided all of its cases *en banc*. Therefore, only an *en banc* court could reconsider the finding. However, in 1973 the court started sitting in panels. Prior to the oral argument the Tribes moved that the case be heard *en banc*, so as not to be faced with the futility of urging a panel to correct the finding of fact made by the full court in 1968. This was denied, as was the Tribes' post-decision motion that the judgment be reconsidered *en banc*. Thus, the Tribes' appeal was an exercise in futility and a denial of Due Process.

Because of the denial of Due Process, the case should be remanded with instructions to consider the Tribes' evidence on the merits, and to enter such judgment as may be warranted by the evidence.

REASONS FOR GRANTING THE WRIT

1. The Court of Claims' "good faith effort" test is wrong, and contrary to the precedents established in this Court's decisions on just compensation, in both non-

---

[11] As even the Court of Claims has on occasion recognized, see *Raylaine Worsteds Inc.* v. *United States*, 137 Ct.Cl. 54, 146 F.Supp. 723 (1956), and see 1B Moore, *Federal Practice* ¶ 0.404[10], pp. 573-74 (1965).

Indian [12] and Indian cases.[13] Moreover, the "good faith effort" test is discriminatory—it attempts to set up a just compensation standard solely for Indians, despite the fact that there is nothing inherent in the ownership of Indian property which renders inapplicable the normal just compensation standards developed by this Court.[14] Indians, if the Court of Claims' "good faith effort" test is to stand, will be put to a much harder burden of proof in any claim they make for a Fifth Amendment taking, than other claimants. Under this test, Congress can condemn tribal land, but then all it has to do to deprive Indians of their right to just compensation is to set up some apparently reasonable machinery for compensating them. Then, if the machinery does not work properly, they can recover for the condemned lands only by proving gross negligence or fraud, obviously a different and far more difficult burden than under the normal just compensation standards, and even then they would not receive the interest to which a condemnee is entitled under the Fifth Amendment. In the present case this amounts to a $3 million loss to the Tribes.[15]

---

[12] In *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 327 (1893), this Court said that it is for the courts, not Congress, to determine what just compensation is in a given case. Yet under the "good faith effort" test, the court must accept as "just compensation" whatever Congress decrees that the Indians shall be paid, provided that Congress made a good faith *effort* to see that the Indians were properly paid.

[13] In *United States* v. *Klamath Indians*, 304 U.S. 119 (1938), the Government pursuant to an act of Congress conveyed 87,000 acres of tribal land to a private road company, without the consent of the tribe. The tribe was paid $108,750, though the land was worth much more. *Held*, tribe entitled to just compensation. This Court certainly did not lay down any test dependent on Congress's "good faith" in paying the tribe $108,750.

[14] E.g., see the *Shoshone* case quoted at p. 8 above.

[15] Moreover, the decisions of this Court cast serious doubt upon whether the good faith of the legislature is subject to judicial attack. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 568 (1903) ("the judiciary cannot question or inquire into the motives which

The court's test will have far-reaching effects on future Indian claims for taking of their property. The government's trusteeship over Indian tribes and their property is still in full force and effect for most tribes today, and examples of direct and indirect condemnation of Indian property continue to occur every year. If this Court fails to review the instant case, it will not only perpetuate an injustice for these petitioners, but will make it necessary for future, similarly situated condemnees to petition this Court until there is a definitive ruling.

Furthermore, the Court of Claims' rationale is at odds with at least one recent lower court case.[16] Until the question is resolved by this Court there will be confusion as to the correct law.

2. The Court of Claims' retroactive application of its new and unforeseeable "good faith effort" test creates a fundamental Due Process question which transcends the boundaries of Indian law. The essence of Due Process is a full and fair hearing in which both parties have the opportunity to develop evidence relevant to the determining principles of law. A party is entitled to know before

---

prompted the enactment of this legislation"). The rule is that Congressional integrity is presumed, *id.* at 568, in which case the Indians are given a hollow remedy: they can win only by successfully attacking that which is invulnerable.

[16] *Big Eagle* v. *United States*, 323 F.Supp. 60 (D.S.D. 1971). In that case, which involved a taking for a dam, the Indians were dissatisfied with the amount tendered and sued for just compensation. Citing the Court of Claims' 1968 decision (which we are asking this court to review) the court held that where—

> ". . . the underlying purpose for the acquisition of Indian land is the necessity for its use in a public project, the government cannot be said to be acting in the capacity of trustee for the interests of the Indian wards. A fifth amendment taking has occurred, which, as pointed out above, automatically includes a promise of just compensation, including interest." At 62.

trial, not after, the principles of law which will determine the outcome of his case. If the court lays down new law calling for facts not theretofore in issue, the parties are out of common fairness entitled to a further trial for the purpose of resolving those facts, and it is a denial of Due Process for the court to make findings based largely on speculation, and then refuse to change those findings when the later-introduced evidence shows they were wrong.

This denial of Due Process was compounded by the refusal of the court to allow the second appeal to be held *en banc*. Without an *en banc* court in 1974 to reconsider the finding of fact by the *en banc* court in 1968, the 1974 appeal was futile.

When the Court of Claims itself commits a denial of Due Process, redress can be had only in this Court. Certiorari should therefore be granted to protect the integrity of the judicial process in the Court of Claims.

CONCLUSION

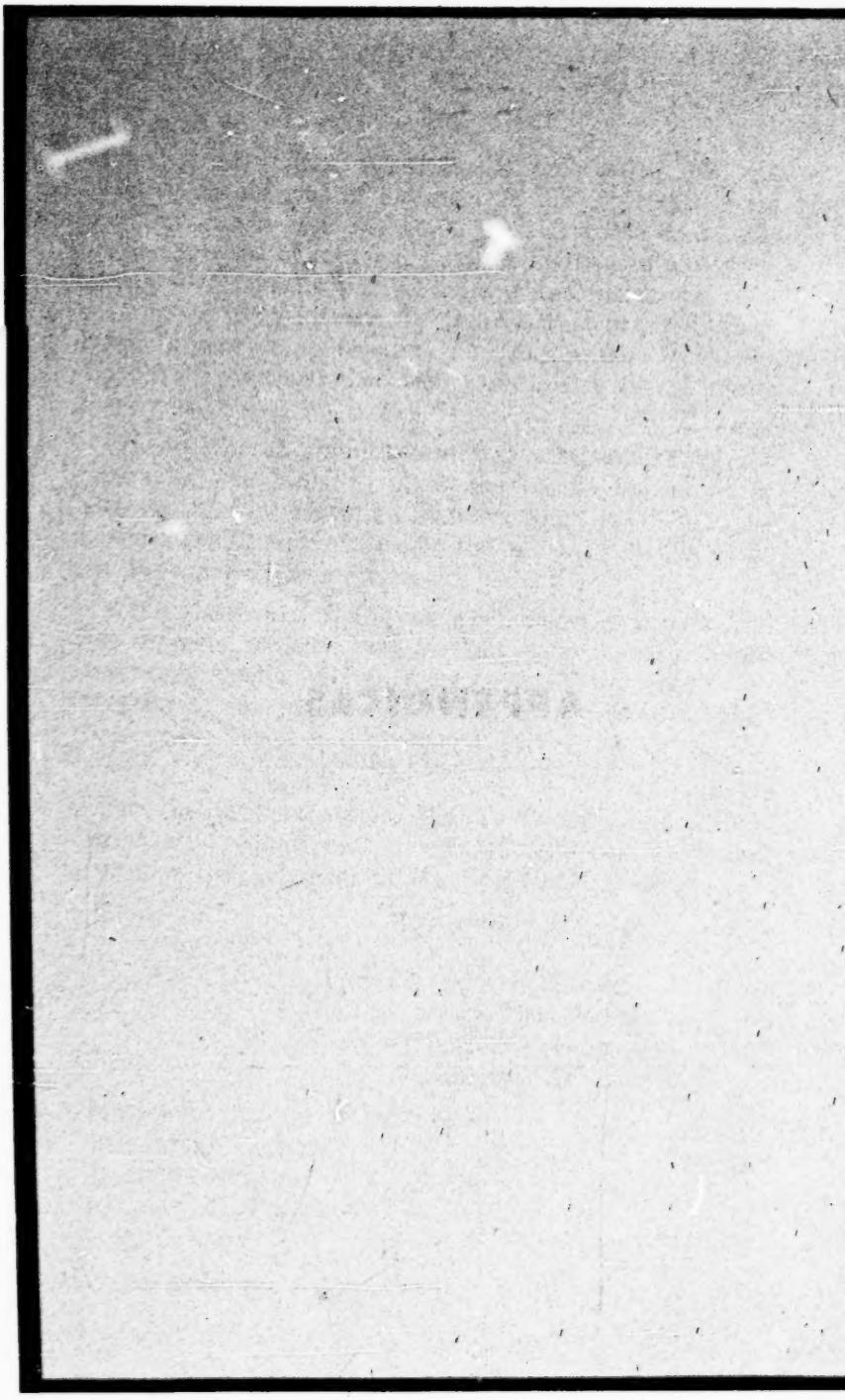
For the reasons stated, the Three Affiliated Tribes respectfully request that a writ of certiorari be issued to review the judgment of the Court of Claims.

Respectfully submitted,

CHARLES A. HOBBS
Counsel for Petitioners
1735 New York Avenue, N.W.
Washington, D. C. 20006

WILKINSON, CRAGUN & BARKER
DONALD C. GORMLEY
JERRY C. STRAUS
PATRICIA L. BROWN
Of Counsel

July 22, 1974



APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 17-72

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, ET AL.

v.

THE UNITED STATES

Before SKELTON, *Presiding Judge*, NICHOLS and KUNZIG, *Judges*.

ORDER

This case comes before the court on appellants' appeal from a decision of the Indian Claims Commission in 28 Ind. Cl. Comm. 264 (1972) in which the Commission held that the decision of this court in a prior appeal of this case in 182 Ct. Cl. 543, 390 F.2d 686 (1968) was the law of the case, and in accordance with such prior decision of this court, the sale by the defendant of lands belonging to appellants known as homestead lands to white settlers pursuant to the Act of June 1, 1910, 36 Stat. 455, was the good faith act of the Government in a fiduciary capacity as trustee of appellants' lands, and was not a taking of such lands by defendant in its sovereign capacity for which appellants would be entitled to just compensation under the Fifth Amendment to the United States Constitution. The defendant agrees with the prior decision of this court and with the decision of the Commission on this question.

Upon consideration of the appeal aforesaid, together with the briefs and oral argument of the parties, and based upon the prior opinion of the court in this case cited above, the court concludes that the appellants are not entitled to recover on their appeal, and that the decision of the Indian Claims Commission in 28 Ind. Cl. Comm. 264 (1972) is correct and should be affirmed.

The defendant filed a cross-appeal in this case with reference to the sale by defendant under the above Act of lands belonging to appellants known as school lands, which sale both this court and the Commission held in the above-cited decisions was a Fifth Amendment taking by the defendant for which the appellants were entitled to just compensation. Since defendant agreed in its brief and in oral argument that if we affirmed the decision of the Commission which held that our prior opinion in this case was the law of the case as to the homestead lands, the defendant would submit to the same doctrine with reference to the school lands and would not insist on its cross-appeal regarding same, we conclude that in view of our decision herein affirming the Commission's decision the agreement of defendant constitutes an abandonment of its cross-appeal and that no action is necessary in connection with such cross-appeal.

Accordingly, the decision of the Indian Claims Commission is affirmed; the appeal of the appellants is dismissed; and the case is remanded to the Commission for further proceedings and final disposition pursuant to this order.

BY THE COURT

/s/ Byron Skelton
BYRON SKELTON
Judge, Presiding

March 29, 1974.

NICHOLS, *Judge*, concurring in the result:

The parties did not argue and I do not believe that the law of the case doctrine would compel us to adhere to an obvious wrong or manifest injustice committed in the course of passing on an interlocutory appeal. *Raylaine Worsteds, Inc.* v. *United States*, 137 Ct. Cl. 54, 146 F. Supp. 723 (1956). Defendant freely concedes this, and therefore, I have considered our former decision on these claims in 182 Ct. Cl. 543, 390 F. 2d 686 (1968) in light of the new evidence offered by the appellant Indians and the arguments of their counsel here. I concluded that our former decision is basically sound with respect to the homestead lands, and should be reaffirmed. The language we used referred to a "good faith effort" by Congress as the test in deciding whether the involved statute, Act of June 1, 1910, 36 Stat. 455, was an Act of expropriation without just compensation in breach of the Fifth Amendment. The "effort" was, of course, the provision for an objective assessment of the Indians land by impartial appraisers. Contrary, I believe, to our intention, plaintiffs took this language as reflecting a tentative determination as to the underlying motives and good will of Congress, which they might thereafter refute. Such inquiries are not permitted to judicial tribunals, with carefully spelled out exceptions not here applicable. *United States* v. *O'Brien*, 391 U.S. 367 (1968), (opinion by Warren, C. J.); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1902). As said in the latter case at 568:

> * * * We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. * * *
>
> The legislation in question was constitutional, * * *

In citing *Lone Wolf* v. *Hitchcock*, we did not intend to be understood as repudiating its teaching. Indians today have available a broader choice of legal avenues to pursue in redressing ancient wrongs than they had in 1902, but I see no reason why the case is not authority today on the narrow issue of applying the Fifth Amendment to determine, as here, whether Indian plaintiffs can recover additional interest as for a Fifth Amendment taking. The Act of June 1, 1910, reflected a policy then favored by Congress of putting Indians on allotments in severalty, selling tribal lands thereby rendered surplus, and placing the proceeds in trust funds to relieve Indian poverty. We know now that this policy did not operate to the Indians' advantage, but we cannot use our hindsight wisdom, or that of expert witnesses, to impugn the motives and good faith of the Congress of 1910. If this court had made no previous pronouncement about this case, the Commission would still have been right in rejecting the evidence proffered on the supposed issue of "good faith effort".

To avoid misstating my position, I deem it necessary to say my satisfaction with our 1968 decision does not extend to its treatment of the school lands issue. In deciding which hat the Congress was wearing, I think we should have considered the Act of June 1, 1910, as a single and entire package. To separate out an interwoven provision, that for donation of sections 16 and 36—under 10% of the whole—to the State for support of schools, was an unwise innovation. The Congress provided for a payment to the Indians for these lands at only $2.50 an acre, facially, but it made an immediate appropriation of $100,000, more than twice what was needed at the $2.50 rate. You can just as well say Congress paid better than $5.00 an acre. The excess remained in the trust funds until, many years later, it was utilized in an Indian Claims Commission proceeding as a "gratuitous offset". How Congress arrived at

the figure, whether $2.50 or $5, is not known. It is contrary to the principles already set forth to impute to Congress, as our former opinion does, an attitude of capricious indifference to what the land was really worth. They may have made inquiries, unrecorded and now lost to history. They may have wanted an excuse to put out the $100,000 to relieve immediate wants. Even that relatively small sum, well in advance of the takings, was worth more to the Indians than a much greater sum, dribbling in for homestead lands years after the homesteaders were put in possession.

However, defendant has advised that its cross appeal is contingent. In the event we decide, as we have, not to disturb the homestead award, the cross appeal is inoperative. I understand this to be so whether we sustain the homestead award on law of the case, or some other ground, although defendant's brief is a bit ambiguous. If I am mistaken, and defendant's concession is so limited as to be inapplicable to my views, I would say our error as to the school lands, though plain, is not sufficiently gross and flagrant to justify breaching the law of the case doctrine in that instance.

In the decision which we are affirming, the Commission awarded the Indians $8,809,057. Of this, $2,765,067 was principal and $4,840,019 interest for the homestead lands; $315,386 principal and $876,509 interest for the school lands. There is an additional amount for two small tracts not involved in this appeal. The relatively larger interest award, percentage wise, for the school lands, is due to the application to them of the eminent domain theory plaintiffs would apply to the homestead lands. No principal amount is now in issue. If we sustained the plaintiffs' appeal on the homestead lands we would increase the award by $3,200,000 additional interest, according to plaintiffs' estimate. These figures, I believe, should be part of the order so as to put the problems before us in their proper perspective.

IN THE UNITED STATES COURT OF CLAIMS

App. No. 17-72

THE THREE AFFILATED TRIBES OF THE FORT BERTHOLD RESERVATION, ET AL.

v.

THE UNITED STATES

Before SKELTON, *Judge*, Presiding, NICHOLS and KUNZIG, *Judge*.

ORDER

This case comes before the court on motion of appellant, filed May 1, 1974, for rehearing including a suggestion for rehearing *en banc*, pursuant to Rules 151(b) and 7(d). Upon consideration thereof, together with the response in opposition thereto, without oral argument, by six active Judges of the court, Judge Kashiwa not participating, as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that appellant's said motion for rehearing be and the same is denied.

BY THE COURT

/s/ Byron Skelton
BYRON SKELTON
Judge, Presiding

May 31, 1974.

APPENDIX B

28 Ind. Cl. Comm. 264

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 350-F

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, ET AL.,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Decided: August 2, 1972

Appearances:

Charles A. Hobbs, Attorney for Plaintiff. Jerry C. Straus, Hugh J. Yarrington, Wilkinson, Cragun & Barker were on the brief.

W. Braxton Miller, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION OF THE COMMISSION

YARBOROUGH, Commissioner, delivered the opinion of the Commission.

This case is now before the Commission on remand from the Court of Claims, *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 182 Ct. Cls. 543, 390 F.2d 686 (1968) (*rev'g*, 16 Ind. Cl. Comm. 341 (1965)). The background of the original action before this Commission, so far as it is pertinent to this opinion, is briefly reviewed below.

Plaintiff's claim in this docket is brought under Section 2, Clause 1, of the Indian Claims Commission Act and arises out of the Act of June 1, 1910, 36 Stat. 455, under which act the Secretary of the Interior was directed to dispose of certain surplus lands (i.e., lands not allotted or reserved) for the benefit of the Fort Berthold Indians, on part of their reservation in Royce Area 713, in North Dakota.

The 1910 Act provided for the sale of the surplus lands under the general provisions of the homestead and townsite laws of the United States at the values determined by an appraisal commission appointed by the President. The Secretary of the Interior was given authority to approve the classification and appraisals made by the commission. The net proceeds of the sale of these lands were to be paid into the Treasury to the credit of the Fort Berthold Indians and were to draw interest at the rate of 3 percent per annum. Pursuant to the 1910 Act, and acts supplementary thereto, approximately 326,540 acres were sold. The 1910 Act also granted the state of North Dakota Sections 16 and 36 in each township for school purposes, or lieu lands selected in place thereof, for which the Indians were to be paid the price of $2.50 per acre. Approximately 29,000 acres were ultimately granted to the State. Section 14 of the Act designated the United States trustee for the plaintiff Indians in the sale and disposal of the homestead lands. In addition to the claim based on the disposal of these homestead and school lands, the suit also embraced claims for just compensation for three small reserves that are dealt with separately in this opinion.

In its initial decision, the Commission found that, under the 1910 Act, there was no taking of plaintiff's lands requiring just compensation under the Fifth Amendment, and that recovery could be had only on proof that the monies received from the sale and disposition

of the homestead and school lands were so far below the then fair market value of the lands that the United States was guilty either of fraudulent conduct or gross negligence amounting to a breach of its assumed fiduciary obligations. 16 Ind. Cl. Comm. 341, 391 (1965).

The plaintiff sought review in the Court of Claims of the Commission's principal determination that no constitutional taking of their lands was involved with respect to lands sold to homesteaders and to lands granted to the state of North Dakota for school purposes. Plaintiff's appeal also raised subsidiary questions concerning the proper dates of valuation and whether compensation would be due for a small tract set aside by Executive order (Royce Area 716). On February 16, 1968, the Court of Claims handed down its decision which affirmed the determination of the Commission in part, reversed or vacated it in part, and remanded the case for further proceedings consistent with its opinion. *Three Affiliated Tribes, supra.* In remanding the case, the Court of Claims stated:

> (1) The land the Government sold and patented to homesteaders, including the Executive order land in Royce Area 716, was not taken under the Fifth Amendment to the Constitution, but was disposed of pursuant to the authority which Congress exercises over Indian tribal property. Appellant is entitled to recover only if it can show that the price at which the Government sold those lands was so far below the fair market value as to constitute gross negligence, fraudulent conduct, or an abuse of the Government's fiduciary relationship.
>
> (2) The lands taken by the Government and given to the State of North Dakota for school lands and the lands set aside for the St. Edward Mission, for the Shell Creek Reservoir, and for the Verendrye National Monument did constitute a taking under

> the Fifth Amendment, and appellant is entitled to just compensation, including interest, less any compensation heretofore paid by defendant . . . (182 Ct. Cl. at 570-571)

The claim for the 490-acre Shell Creek Reservoir tract, considered by the Court of Claims, has been withdrawn by the plaintiff on evidence adduced in these proceedings indicating that the tract was restored to the plaintiff.

Following the court's mandate, the Commission conducted further proceedings, receiving documentary evidence as well as the testimony of expert appraisal witnesses on the question of the fair market values of the lands in suit as of their dates of disposal. Certain other arguments and issues which were raised in the briefs on remand challenging the correctness of the Court of Claims' decision in the instant suit are discussed in this opinion in their proper sequence.

I. *Valuation Dates*

The question of the proper valuation dates for the subject lands was thoroughly considered by the Commission in its 1965 decision. 16 Ind. Cl. Comm. at 382-86. The Court of Claims, as did the Commission determined separate valuation dates for each of the several takings in this case. The court agreed with the Commission as to the proper method of fixing the valuation dates for the homestead lands, but disagreed as to the valuation dates for the school lands. The court's language in this respect is quite clear:

> . . . (3) The valuation dates for the several takings are as follows:
>
> (a) The average date of entry for the lands sold to homesteaders shall be computed separately for each of the four different entries;

> (b) For the school lands, the court finds that the proper valuation date is the day on which title passed—
>
> (i) June 1, 1910, the date of the 1910 act, for those "place lands" (sections 16 and 36) previously surveyed;
>
> (ii) The date of the completion of the surveying for the remainder of the "place lands";
>
> (iii) The date the state made its selection of previously surveyed "lieu lands"; . . . (182 Ct. Cl. at 571)

In the course of the valuation hearings, the plaintiff argued for separate valuation dates on a year-by-year basis for the homestead lands. However, we find no valid reason to depart from our original view that the average date of entry for the homestead lands in each of the four separate offerings is the proper valuation date, the Court of Claims having approved of this method here. Plaintiff, having conceded that no substantial difference would result no matter what method is used, has submitted no convincing new arguments on this issue which were not presented on appeal. The parties are in agreement as to the valuation dates governing the school lands and the small reserves. Accordingly, the valuation dates of all the subject lands are determined to be as follows:

(a) Homestead Lands:

Block I: October 1912

Block II: June 1916

Block III: January 1917

Block IV: May 1917

(b) School Lands:

Place lands: September 29, 1911

Lieu lands: April 4, 1912

(c) Small Reserves:

St. Edward Mission: September 16, 1916
Verendrye National Monument: June 29, 1917

II. *Lands Sold to Homesteaders*

The issues before us respecting the lands sold to homesteaders under the 1910 Act are (1) the fair market value of the subject lands on the respective valuation dates, and (2) whether the United States, as trustee for plaintiff tribe, sold said lands so far below their then fair market value as to constitute fraudulent conduct or gross negligence. These homestead lands which were subject to sale under the 1910 Act total 326,540 acres, situated north and east of the Missouri River in parts of Mountrail, Mclean, and Ward Counties, North Dakota.

The subject lands consisted mainly of smooth prairie containing almost all productive crop lands. The soils in the subject area, coupled with good climate and adequate rainfall, were favorable for the raising of cereal crops, especially wheat. Approximately 90 percent of the subject lands had a highest and best use for agriculture, with the balance being best utilized for grazing purposes.

The economic history and background of subject area was one of substantial economic growth in the decade beginning in 1910. The record establishes that the most rapid conversion of raw land into farms in North Dakota occurred in the general vicinity of the subject area where settlement and land availability were of comparatively recent origin. Wheat was the principal crop in and near the subject area and accounted for over 60 percent of the value of all farm crops and livestock in North Dakota. By 1912, there already existed more than adequate railroad service within practical reach of subject area. These railroad lines afforded direct

connections with the principal farm markets and flour-milling centers of the Midwest.

For farmers the early 1900's were especially favorable because of the rapid growth of the nation's population, the increasing demand for farm products, and the resultant disappearance of farm surpluses. Between 1898 and 1915 wheat production rose from 69 million bushels to 159 million bushels in North Dakota alone. In summary, the general picture in western North Dakota during the period under consideration is that of a booming rural land market stimulated by such positive factors as highly productive lands, good transportation facilities, substantial population growth in the area, and favorable farm produce prices.

The bulk of the value evidence was presented in the appraisal reports and in the testimony of the parties' two expert witnesses. Both appraisal experts divided the homestead lands into three principal land classes as of the respective valuation dates. Fertile crop lands with a high wheat yield per acre fell into Class I-Agriculture, lands of generally good productivity but of intermediate quality and yield were placed in Class II-Agriculture, and those lands too rough for cultivation were grouped into Class III-Grazing. However, each witness allocated different acreages to one or the other land classifications. These acreage differences within the three land classifications accounted, in part, for the different fair market value conclusions of the expert witnesses since these conclusions resulted from calculations based on an average sales index price per acre for each land class multiplied by the number of acres found in each class.

Mr. Mont Saunderson, expert appraiser for the plaintiff, classified the homestead lands on the basis of soil survey maps, aerial photographs and personal field observations. He, in effect, rejected the land classifications

used by the original appraisal commission set up under the 1910 Act. Mr. Harry Fenton, expert appraiser for the defendant, relied essentially on county soil maps which he considered to be more representative of the actual situation as it existed in the 1910-1920 period. Mr. Fenton found that the original classifications of 1910 came remarkably close to modern soil surveys of the subject area. While Mr. Saunderson was critical of the classification criteria used by the 1910 appraisal commission, he apparently agreed that the 1910 land classifications could conceivably be more accurate than his own. The expert appraisers' final land classifications for the homestead lands are as follows:

Class	Fenton	Saunderson
I	194,749 acres	235,800 acres
II	100,589	47,950
III	30,567	39,800
Other	—	2,308

On the record as a whole we have concluded that the overall land classifications of Mr. Fenton, defendant's witness, more reasonably reflect the quality of the homestead lands on the respective valuation dates.

In valuing the homestead lands, both parties adopted conventional market data appraisal procedures. The deed records of three adjoining counties were abstracted for private farm sales that took place in or near the subject area during the 1910-1920 period. Both parties arrived at their ultimate sales index values on a per acre basis for each of the three land classes by applying the average per acre value found in the comparable sales area to the same three land classifications for the homestead lands. Finally, the average sales index price thus determined for each class was multiplied by the number of acres found in each of the three classes. In all, the

defendant abstracted 1,421 sales and the plaintiff 341 sales. With the exception of a higher upper range in Class I lands, the parties arrive at nearly identical per acre averages for each class, and despite acreage differences in land classifications and the plaintiff's yearly averaging, they reached remarkably similar conclusions as to the indicated gross comparable sales value of lands like the subject lands. Plaintiff's total unadjusted sales index value figure approximates $6,240,000 while defendant's unadjusted sales index value figure is roughly $6,000,000.

Defendant's appraiser abstracted a far greater number of sales both within subject area and in the adjoining counties; his data includes a substantial number of plaintiff's sales. We believe, therefore, that defendant's more comprehensive data represents a more accurate reflection of the market for land. Accordingly, we have accepted defendant's sales index of value for the Class I and Class II agricultural lands for the subject area.

With respect to the grazing or Class III lands, the basic sales data presents problems of analysis. There is a relatively small amount of grazing lands within the subject tract, roughly 30,000 acres, and the record contains little sales data that reflects purely grazing lands transactions. Even in those sales recorded as Class III we do not find grazing land segregated out of a typical 160-acre farm land transaction. This factor, when added to the possible improvements connected with the farm, accounts in part for defendant's exceptionally high sales index of $15 per acre for the Class III category—a price we believe completely unrepresentative of bare grazing lands. We also find that the plaintiff's sales index value for grazing lands, averaging between $3.50 and $5.00, is not supported by adequate evidence of actual sales. Plaintiff's grazing land sales index apparently is derived from plaintiff's expert's testimony and report of

railroad grant land sales in the adjoining counties. We do not believe the record persuasive on this account in the absence of more specific sales data covering railroad land transactions. Accordingly, we have rejected plaintiff's value conclusions for grazing lands in the subject tract.

There is, nevertheless, sufficient sales data upon which the Commission can determine the fair market value of grazing lands in the subject area. In the light of evidence of contemporary expressions that grazing lands sold between $2.50 and $10.00 per acre, the Commission has selected from defendant's comprehensive list of Class III sales in the adjoining counties and in the subject area for the period 1910-1920 all sales up to $10.00 per acre. In our judgment these sales probably represent the least desirable unimproved lands, which were best suited for grazing purposes. In all, 62 sales were found totalling 10,000 acres for a weighted average price of $7.70 per acre (rounded off). We find this 10-year per acre average to be a reasonable value for grazing lands as such. By our selection-out process in taking the lowest priced sales in the Class III category, we believe we have eliminated any sales tracts with substantial improvements and, therefore, find no need to make any further downward adjustment for improvements in our gross sales index value for grazing lands. Hence, our unadjusted gross sales index value for grazing lands is also the fair market value of the grazing lands in the subject tract on the several taking dates. Our Finding No. 40 sets out the gross sales index value of the subject homestead lands for each of the three land classifications at the valuation dates.

While the parties disagree as to the amount, both agree that since the comparable sales data utilized involved some improved farms, the sales index derived therefrom must necessarily be reduced or discounted to elimi-

nate as far as possible the incremental value of improvements as well as the cost of land subjugation (breaking and clearing). Mr. Saunderson proposes a discount of 20 percent of the gross market value to arrive at an adjusted fair market value of $4,944,772 for the homestead lands. His discount proposal was drawn principally from an analysis of 1910 and 1920 census data covering the three counties of Mountrail, McLean and Ward. Since it appears that Mr. Saunderson, by averaging census data covering the three adjacent counties in the subject area, arrived at an average discount figure of 12 percent of the gross market value to cover the cost of constructed improvements and fencing, the average percentage cost for land subjugation amounts to 8 percent. As to Mr. Saunderson's 8 percent discount factor for land subjugation, we question the relevancy of some of his data since it is based on costs in an area too remote from subject lands to support a meaningful conclusion. On the whole, we think plaintiff's estimated 8 percent discount factor for land subjugation is too conservative.

Mr. Fenton, for the defendant, used an itemized dollar breakdown of building, land breaking, fencing and crop costs to arrive at a per acre discount figure of $8.50 before 1912 and $9.50 thereafter, or a total adjusted fair market value of $3,176,461. According to Mr. Fenton, the additional dollar per acre after 1912 would cover increased labor costs and the probability that earlier comparable sales involved less sophisticated improvements. The total allocations thus achieved by the defendant, averaging to a 50 percent-plus discount factor, was applied across the board to all classes of land including Class III grazing, which Mr. Fenton considered to have had at least minimal improvements.

To estimate 1910-1920 costs of fencing, breaking, and cropping, Mr. Fenton used contemporary documentation,

supplemented by some limited information garnered from old settlers living in the subject area. Mr. Fenton, as well as Mr. Saunderson, recognized that improvement costs in earlier sales involved simply constructed cabins and similar crude structures, and that not more than half of the comparable sales could be considered to have had significant structures, a factor which Mr. Fenton considered in all his calculations. Although the record is not entirely clear, it appears that Mr. Fenton also recognized the value of using census data. He referred to the 1920 census, for example, as the only "firm evidence" to determine the value of improvements on North Dakota farms. He stated objections to census data include the relatively subjective nature of the reported information and the doubtful expertise of the census takers. Given the particular difficulty of the discount problem, a fact readily conceded by the parties, we believe that reliance on census data is not unreasonable under the circumstances.

The defendant has also devoted some effort to support its 50 percent-plus discount factor by emphasizing the apparent wide variation in the sales prices within the same land classes. The defendant suggests that the only logical explanation for the variation is the presence of improvements on the land in question. While we find some merit in defendants' analysis, we believe equal consideration may also be given to other valid factors which would influence a purchaser in paying a higher price for nearby lands in the same quality class. Such factors would include improved cultivation, a history of crop successes as compared to a neighbor's farm, the premium value usually attached to abutting property as opposed to a more remote package, and the many undisclosed factors in land sales that usually cannot be interpreted by a mere look at the bare purchase price. While we appreciate the thoroughness of research ap-

parent in this entire record, we nevertheless find that defendant's discount factor is excessive by a considerable amount. Additionally, we do not agree with the parties that the improvement discount is applicable to Class III grazing lands as such and we have, as previously noted, made no downward adjustment in that land class.

In the light of the record as a whole, it is found that the method utilized by Mr. Saunderson, plaintiff's appraiser, to arrive at the proper discount required to eliminate the element of improvements involved in the sales used to determine fair market value, seems to be more correct and therefore persuasive. As to his ultimate conclusions, however, we are of the opinion that the discount factor should be higher for improvements with respect to the transactions that make up the sales index. The 1910-1920 census data utilized by Mr. Saunderson in calculating his improvement discount incorporates both saleable and non-saleable properties, while the sales index is based strictly on saleable properties. This alone would justify an upward adjustment of several percentage points over the plaintiff's improvement discount. We therefore conclude, on the basis of all the evidence, that a fair and reasonable discount factor, which includes all constructed improvements, fencing, some crops, and land subjugation is 25 percent, to be applied against the gross sales index value of agricultural lands. The net value per acre of the subject tract appears under Finding No. 46.

Upon consideration of the record, including the testimony and reports of the expert appraisers for the parties; the detailed studies concerning the quality and class of subject lands; the contemporaneous (1910-1920) and comparable sales and resales within and adjacent to subject area; and the cost of improvements and land subjugation in the comparable sales areas, the Commission finds that the adjusted fair market value of the subject home-

stead lands was, on the indicated dates of valuation, as follows:

Block I	October 1912:	$2,802,119
Block II	June 1916:	1,462,585
Block III	January 1917:	36,006
Block IV	May 1917:	126,311
		$4,427,021

The Commission further finds that plaintiff received, in proceeds, the net amount of $1,661,954 from the sale of 326,540 acres of homestead lands (an average of $5.09 per acre) having a total fair market value of $4,427,021 (an average of $13.50 per acre).

Defendant, denying any liability, argues, among other things, that the evidence does not show that the monies received from the sale of the homestead lands under the 1910 Act were so far below the fair market value as to amount to fraud or gross negligence. Defendant further urges that the evidence generally is insufficient to establish market value in this case, although defendant's own witness finds the fair market value of the homestead lands to be in excess of $3,000,000 after discount for improvements. We find that in disposing of the homestead lands for a price less than half their true market value, the defendant was incontestably grossly negligent. No issue of possible fraud need be discussed.

In our view, therefore, ample evidence supports our conclusions respecting the fair market value of the homestead lands and we, accordingly, hold that the sale and disposal of said lands by the defendant for an amount so far below their fair market value constitutes gross negligence amounting to a breach of the fiduciary obligations assumed by the defendant under the provisions of the 1910 Act. Plaintiff is, therefore, entitled to re-

cover under our Act the difference between the fair market value of the homestead lands and the proceeds they received for the lands, or a net principal amount of $2,765,067.

III. *School Lands.*

The school lands ultimately granted to the state of North Dakota by the defendant under the 1910 Act consisted of 12,023 acres of place lands and 17,459 acres of lieu lands, or a total of 29,482 acres. In reversing the Commission's determination in this portion of the case the Court of Claims held that the disposition of the school lands amounted to a taking for which, under the Fifth Amendment of the Constitution, plaintiff is entitled to just compensation. With no dispute as to liability, our principal concern here is the fair market value of the school lands as of their "taking" dates. The agreed date of taking for the place lands is September 29, 1911, and for the lieu lands, April 4, 1912. Since the parties valued the school lands on essentially the same basis as the homestead lands and applied the same discount factors, our conclusions respecting homestead lands are equally applicable to subject school lands. See Section II, this opinion *supra*. Defendant's proposed ultimate fair market value is $244,687 for school lands and plaintiff's is $412,751. The record discloses a substantial similarity in the gross sales index of market values determined by both parties and their difference is largely attributable to the discount factor applied by the parties to reach the adjusted value of the school lands. We have adopted defendant's land classifications and gross sales indexes for the agricultural lands, and plaintiff's method of improvements discount as was done for the homestead lands. Our Finding 50 sets out the gross sales index values of the school lands and their net values after discount for improvements and land subjugation.

Upon consideration of the entire record, including the testimony and reports of the appraisal experts for both parties, and by similar tests as applied to the sales data, *supra*, we find that the fair market value of the school lands on the two dates of taking is as follows:

Place lands:	September 29, 1911:	$150,378
Lieu lands:	April 4, 1912:	208,655
	Total:	$359,033

The parties have taken issue with the question of the correct treatment of the consideration paid for the school lands. Section 12 of the 1910 Act authorized an appropriation of $100,000 or "as much thereof as may be necessary to pay for the school lands granted to North Dakota." Since the school grants ultimately totaled 29,482 acres rather than the originally projected 44,000 acres, $73,705 of the $100,000 fund, calculated at $2.50 per acre, was necessary to pay for said school lands. In keeping with the intent of Congress that the school lands be paid for at $2.50 an acre, and that so much of the $100,000 fund as may be necessary be utilized to pay for said lands, we have calculated the consideration paid on the basis of the actual acreage disposed of at the said statutory rate of $2.50. The excess, amounting to $26,295, appears to have remained credited to the Fort Berthold Fund in the nature of a gratuity. In 1930, however, the United States Court of Claims, under the assumption that only 17,458.64 acres was disposed of under the 1910 Act, charged the Indians with offsets in the amount of $56,343.40 (out of the $100,000). *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308.

The computation of the amount of interest due in these circumstances is not without difficulty. We choose to use a method that reflects the effect of both the payment in 1910 and its partial recoupment in 1930. This avoids any necessity of this transaction being the subject of a

separate accounting action.[1] As explained below under our treatment of the interest question and detailed in our Finding 50, this results in a total of $1,191,895 principal and interest due as of June 30, 1972, plus further interest on the principal sum of $315,386 until payment.

IV. *Small Reserves.*

The 253 acre Verendrye National Monument tract was set aside by a presidential proclamation issued on June 29, 1917. Under the Act of February 14, 1920, § 16, ch. 75, 41 Stat. 424, the Indians were paid $5.00 per acre for this land. The Court of Claims, in finding that the original setting aside of these lands by proclamation in 1917 and the subsequent payment of $5.00 per acre some three years later was not a "purchase" of these lands by defendant, concluded that a taking under the Fifth Amendment occurred for which plaintiff is entitled to just compensation less the consideration received.

The court also concluded that the 160 acre St. Edward Mission tract was held by the Indians as a reservation and that a Fifth Amendment taking occurred when it was patented by defendant to the Bureau of Catholic Indian Missions on September 16, 1916, without the payment of any compensation to the plaintiff Tribe. 182 Ct. Cl. at 563-64.

In determining the value of these two small tracts, the Commission has considered all the evidence of valuation including that submitted in connection with the general land classifications of all the subject lands, and the valuation of the homestead lands. On the basis of defendant's Class II sales index value, less 25% adjustment for im-

[1] *See* Docket 350-G, wherein plaintiff requests an accounting of the overpayment which occurred as a result of the offset charged in the 1930 proceedings.

provements and land subjugation, we find that on September 16, 1916, the St. Edward Mission tract had a fair market value of $2,400. Plaintiff is therefore entitled to just compensation in the principal amount of $2,400 for the St. Edward tract. Differences as to the fair market value of the Verendrye National Monument tract, which are $2,530.40 for plaintiff and $1,392.00 for defendant, arise principally from variations in land classification. The Commission finds that this tract does not warrant any higher classification than Class III grazing. On the basis of all the evidence of record, the Commission finds that the Verendrye National Monument tract, as of June 29, 1917, had a fair market value of $7.70 per acre. Accordingly, for the Verendrye National Monument tract, plaintiff is entitled to recover $1,948 as just compensation less the delayed payment received on February 14, 1920, from the defendant in the amount of $1,265.20. Plaintiff is also entitled to interest as part of just compensation. The interest question, the effect of interest on the $1,265.20 payment by defendant, and the computation of interest are treated below and in Finding 52.

V. *Interest.*

(a) *Homestead Lands.* Plaintiff contends that it is entitled to interest in the case of subject homestead lands regardless of the theory of recovery (i.e. just compensation or breach of trust). As to just compensation, plaintiff, in its briefs, argued that new evidence before the Commission clearly indicates that Congress, in furtherance of a national policy of providing cheap land for settlers, took the subject homestead lands without consent and in direct opposition to the best interest of the tribe. In a few words, Congress, according to plaintiff, took the subject lands for public purposes for which the defendant should pay just compensation including interest as part of just compensation.

Plaintiff's new evidence consists of the report and opinion of Dr. Verne Ray, a noted anthropologist, mostly going to the Indians' protest and the real motives of the sponsors of the 1910 Act. We do not feel that this evidence requires changes in our decision or that of the Court of Claims in this case. The court had before it all it needed to find a good faith effort on the part of Congress in dealing with plaintiff's lands, and though other factors now in the record might have been considered, they would not by themselves appear to be controlling. *See Confederated Salish & Kootenai Tribes* v. *United States*, 193 Ct. Cl. 801, 437 F.2d 458 (1971). We follow, as the law of the case, the court's determination that there was no Fifth Amendment taking of the homestead lands.

Next the question arises whether the 1910 Act itself carries a provision requiring as an element of damages the award of interest on the net proceeds that should have been received had the defendant not violated its obligation under that act. The basis for awarding interest as damages in the case of the homestead lands, if one exists at all, must be a specific and unequivocal promise or agreement by the United States to pay interest on the proceeds of the sale of the lands. *See United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951). The intent to pay interest must be translated into affirmative statutory terms. *United States* v. *N. Y. Rayon Importing Co.*, 329 U.S. 654 (1947); *Confederated Salish & Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451 (1966).

The relevant section of the 1910 Act reads as follows:

> Sec. 11. That the net proceeds derived from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States to the credit of the Indians belonging to and having tribal rights on said reservation, which shall draw

interest at the rate of three per centum per annum;

. . . .

The legislative pronouncement contained in section 11 of the 1910 Act constitutes a direct and unequivocal promise by the United States to pay 3 percent interest on proceeds which, at the time of the passage of said act, were indeterminable. It is this express provision for interest which, in our view, permits plaintiff to recover interest at the statutory rate of 3 percent as part of the damages and which, moreover, sets this case apart from others where interest was not allowed.

The case chiefly relied on by the plaintiff in arguing for interest is that of *Peoria Tribe of Oklahoma* v. *United States*, 390 U.S. 468 (1968), *rev'g*, 177 Ct. Cl. 762, 369 F.2d 1001 (1966) *aff'g in part, rev'g in part*, Docket 65, 15 Ind. Cl. Comm. 123 (1965), where interest was allowed as damages for breach of a treaty resulting in inadequate proceeds where the treaty called for interest on the proceeds deposited. There the obligation breached was one agreed to by treaty; here the obligation breached was one imposed by implied trust under the statute. We find it of significance that that treaty carried within itself provision for the payment of interest on all deposits of the yet-to-be-determined proceeds.

The *Peoria* case was discussed and distinguished in the recent case of *United States* v. *Nez Perce Tribe*, 194 Ct. Cl. 490 (1971) *rev'g*, Docket 175-B, 22 Ind. Cl. Comm. 53 (1969)), denying interest on an award based on revising an agreement for unconscionability of consideration under Section 2, Clause 3 of the Indian Claims Commission Act. The court pointed first to the fact that the *Peoria* action was for a breach of a treaty and not a revision to award greater consideration under an agreement as in *Nez Perce*. The court attached more significance to the specific wording of the respective interest clauses:

> By comparison it becomes clear to us that the provision for interest in the case of the Peoria treaty was of a nature that could support a decision to pay interest on any additional sum awarded, while the provision in point as to the Nez Perce Tribe was not so loosely worded as to tolerate interest being paid on any more than the original amount contained in the agreement. In other words, the government in the Nez Perce case did all it promised; i.e., the agreement was not an open-ended transaction and it was fully complied with . . . (194 Ct. Cl. at 497.)

In *Confederated Salish & Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451 (1966), an original jurisdiction case, the court denied interest on an award made for the breach of a treaty by a 1904 Act directing the deduction of surveying costs from the proceeds of land sold in trust. The court found no taking under the Fifth Amendment. The court noted no specific statutory command by either the treaty or the 1904 Act to pay interest, and rejected payment of interest for breach of a trust or contract absent a specific statutory command. The court held that the provisions of the Act of April 1, 1880, 25 U.S.C. § 161 (1970), a general statute requiring the payment of interest on Indian trust land proceeds deposited in the Treasury, was not controlling because the 1904 Act sued on was a *pro tanto* Congressional modification of the 1880 Act's requirement that "all sums received" be deposited at interest. By contrast in the instant case there is a specific statutory command for the payment of interest on the net proceeds of the trust land sales that were mandated by the 1910 Act, and as seen above, the obligation to pay interest is open-ended, not limited to a fixed sum. Here there is a *pro tanto* modification of the 1880 Act's requirement for interest, and substitution for it of another interest provision applying to these proceeds.

Because of these distinctions, not one of these analogous cases appears controlling on the present case. Perhaps the central principle to be derived is that where congressional intent is manifested in sufficiently clear terms specific requirements for interest will be enforced as a part of damages. Here, the congressional intent has been found by the Court of Claims to be that the plaintiffs' proceeds should be the full market value of their lands, since had there not been such an intent the statute would have been a taking of property protected by the Fifth Amendment. The 1910 Act requires that all proceeds without limit be put at interest. Therefore, we hold that the construction of the 1910 Act by the court above determines congressional intent that the proceeds here awarded should draw 3 percent interest under the affirmative statutory provision of the 1910 Act.

In our Finding No. 49, we have calculated the interest on the principal award for the homestead lands from the various taking dates to June 30, 1972, to be $4,840,019, at the rate of 3 percent per annum. Accordingly, our award to plaintiff for the subject homestead lands is for the sum of $7,605,086 together with simple interest at 3 percent per annum on the principal amount of $2,765,-067 from June 30, 1972, to the date of payment.

(b) *School Lands and Small Reserves.* In reversing the Commission's prior decision, the Court of Claims held, as to the subject school lands and the two small reserves, that plaintiff is entitled to recover just compensation including interest under the Fifth Amendment for the taking of said lands. See Sections III and IV, this opinion, *supra.* The parties disagree as to the proper rate applicable in this case.

Where the United States takes property under its power of eminent domain, it has been consistently held that the Fifth Amendment's reference to just compensa-

tion entitles the property owner to receive interest or its equivalent from the date of taking to the date of payment as part of his just compensation. *Jacobs* v. *United States*, 290 U.S. 13 (1933); *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299 (1923); *United States v. Rogers*, 255 U.S. 163 (1921). It is equally well-settled that a judgment in a just compensation case involving Indian tribal lands taken under the Fifth Amendment will also bear interest as part of just compensation. *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119 (1938); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); *Uintah and White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1, 11-12, 152 F. Supp. 953 (1957); *Seminole Nation* v. *United States*, 102 Ct. Cl. 565, 621-622 (1944); *cert. denied*, 326 U.S. 719 (1945).[2]

In the *Seaboard* case *supra*, the Supreme Court held that the requirement of just compensation was comprehensive and no "specific command" to include interest is necessary. The Court, in defining just compensation stated (p. 316):

> . . . Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. *Interest at a proper rate is a good measure* by which to ascertain the amount so to be added. (Emphasis added)

Thus, the measure of the increment to be added to the value of the property taken to arrive at "just compensation" has consistently been expressed in terms of inter-

---

[2] On remand following reversal on unrelated grounds, *Seminole Nation* v. *United States*, 316 U.S. 286 (1942), and 316 U.S. 310 (1942)—two cases.

est.[3] Without doubt the interest increment commanded by the Constitution must be at a rate which is "proper" or "reasonable". The courts generally have chosen not to thresh out the question of what is "reasonable" or "proper" with thoroughness and clarity, but appear to have adhered to a rule of convenience in avoiding ancillary trial proceedings on this issue. In Indian tribal claims this perhaps has been an unexpected blessing, for if the interest question is to be dealt with as a contested factual issue, another complex and little-desired phase will be added to our already over-burdened trial procedures in Indian cases. However, the issue of the proper rate has been raised here and briefed, and the parties have submitted additional evidence at the Commission's request.

Defendant initially urged that the standard applied by the Court of Claims in *Uintah and White River Bands* v. *United States, supra,* is controlling in computing just compensation for a Fifth Amendment taking of lands. The rate of interest adopted in *Uintah* was first applied in *Alcea Band of Tillamooks* v. *United States,* 115 Ct. Cl. 463, 87 F. Supp. 938 (1950), *rev'd on other grounds,* 341 U.S. 48 (1951).[4] In that case, the court, after reviewing its past practice on the question, allowed 5 percent up to 1934 and 4 percent thereafter. The 4 percent reduced rate retroactive to 1934 was based on the court's taking judicial notice of the fact that in 1934 depressed

---

[3] In the *Shoshone* case, *supra,* the Court suggested, in addition to interest, that the increment may be measured by some other standard as may be "suitable in the light of all the circumstances." However, no such other standard has been found by the court.

[4] *See also Rogue River Tribe* v. *United States,* 116 Ct. Cl. 454, 89 F. Supp. 798 (1950), *cert. den.* 341 U.S. 902 (1951). More recently, the Court declined to review its commissioner's finding of the *Alcea* formula on the ground the issue was first raised on appeal to the Court, *Confederated Salish & Kootenai Tribes* v. *United States,* 193 Ct. Cl. 801, 805-6, 437 F.2d 458, 460 (1971).

economic conditions in the nation had lowered interest rates on large investments.

Plaintiff, on the other hand, contends that the conclusions in *Alcea* and *Uintah* are no longer valid and that economic conditions have changed so drastically since *Alcea* as to warrant an alteration of the interest rate again. Plaintiff urges a rate of 6 percent during the last decade, or that the restoration of the 5 percent rate from 1934 will result in an averaging of the relatively depressed situation of the 1930's and the inflated conditions of the 1960's. Since the *Alcea* case originating the reduced 4 percent rate was decided over 20 years ago, we deem it appropriate to reexamine that rate to the extent the question is open. In its own terms, *Alcea* could not have been intended to be an expression of a permanent standard given the uncertain and temporary nature of the economic fluctuations in the nation's business of which the court took note.

Inasmuch as the Court of Claims in the instant case on appeal did not express any adherence to a particular rate of interest to be added as part of that just compensation to which plaintiff is entitled for the taking of its lands, we feel free to make a de novo determination of the amount which constitutes just compensation and the proper rate of interest as an inseparable element thereof applicable in this case.

In a recent case, *Ponca Tribe* v. *United States*, Docket 323, 24 Ind. Cl. Comm. 339 (1970), the Commission made an award including interest as a part of just compensation at the rate of 5 percent for each year from 1877 to present, but did not give reasons for its selection of that rate. In remanding for further proceedings, the Court of Claims stated,

> . . . As a *nisi prius* tribunal, the Commission has the authority to fix the rate by which just compen-

> sation is measured on the basis of the evidence and other material submitted to it on the question.
>
> On remand, the Commission may supply the more specific findings and reasoning required by this order, or in its discretion, it may open the record for further evidence. . . .
>
> (*Id.*, App. No. 7-71 (Ct. Cl., Feb. 22, 1972.))

In its decision and action in this case, the Commission has striven to comply with that mandate.

Federal judicial determinations respecting the interest factor do not offer totally satisfactory guidelines for determining a reasonable rate of interest in just compensation cases. As far as tribal claims are concerned, the Supreme Court in only one case suggested a specific rate of interest based on prior dealings of the government with the tribe. *Shoshone* v. *United States*, *supra*, (5 percent rate based on a treaty and statute related to the tribe). The Court of Claims, on the other hand, appears to have held to a rule of judicial discretion by applying varying rates of interest to fit the special facts and circumstances of the particular case.

In tribal claims, the Court of Claims, following the Supreme Court mandate in *Shoshone*, *supra*, used the 5 percent standard in other Fifth Amendment taking cases. *See*, *e.g.*, *Klamath and Moadoc Tribes of Indians* v. *United States*, 85 Ct. Cl. 451 (1937); *Creek Nation* v. *United States*, 84 Ct. Cl. 12 (1937). The rationale in these cases, as pointed out in *Shoshone*, was founded in treaties, acts of congress and agreements with Indian tribes, which have frequently provided for interest on funds held in trust by the government for the benefit of Indians at a minimum rate of 5 percent per annum. In 1944, the Court of Claims reduced the rate to 4 percent in *Seminole Nation* v. *United States*, *supra*, upon the fact that tribal funds were drawing 4 percent since the

date of taking in that case. In 1950, the court adopted a 5 percent and 4 percent formula in the *Alcea* case on grounds explained in this opinion, *supra*. In non-trial claims the Court of Claims applied 6 percent until 1937, *DeLuca* v. *United States*, 84 Ct. Cl. 217 (1936); *Atlantic Refining Co.* v. *United States*, 59 Ct. Cl. 108 (1924), when it applied a 5 percent rate; *Barlow* v. *United States*, 87 Ct. Cl. 287 (1937). In takings arising out of World War II, the court applied a 4 percent rate in numerous cases starting about 1946. *See, e.g., Wilson Line Inc.* v. *United States*, 111 Ct. Cl. 764, 78 F. Supp. 821 (1948); *A. D. Walker & Co.* v. *United States*, 105 Ct. Cl. 553, 64 F. Supp. 135 (1946). In *Arkansas Valley Railroad Co.* v. *United States*, 107 Ct. Cl. 240, 68 F. Supp. 727 (1946), plaintiff sought to invoke the 6 percent legal rate of Kansas. In denying the request—four years before taking judicial notice of economic conditions in the *Alcea* case—the court applied a 4 percent rate in recognition of the fact that prevailing interest rates had been low for some time.

Prior to the Declaration of Taking Act of February 26, 1931, 40 U.S.C. § 258a (1970), procedures in federal condemnation cases accorded with state law pursuant to the provisions of the Conformity Act of August 1, 1888, 25 Stat. 357. Under that act, the courts were not required to apply the legal rate of interest of the state where the condemned property was located since just compensation was safeguarded by the Constitution and could not, therefore, be made to depend upon state statutory provision. But in the absence of some other satisfactory guide, the federal courts, nevertheless, applied the local rate of interest even though not required to do so by conformity. The practice was upheld by the Supreme Court in *United States* v. *Rogers*, 255 U.S. 163 (1921), as being a "convenient and fair method" of ascertaining just compensation. The *Rogers* rule, while discretionary

and not disapproving of another rate equally as convenient and fair, has resulted in wide disparities whereby rates as low as 4 percent in some cases and as high as 8 percent in others have been allowed. *E.g., United States* v. *40,379 Square Feet of Land*, 58 F. Supp. 246 (1947) (4 percent, Mass.); *United States* v. *First National Bank*, 250 Fed. 299 (1918) (8 percent, Alabama). The rate of 6 percent has generally prevailed on the state level, however, and is the rate most uniformly used by the federal courts.

Since 1931, under the Declaration of Taking Act, Congress has directed that a judgment in condemnation include, as part of the just compensation awarded, interest at the rate of 6 percent on the unpaid portion of the value in excess of the amount required to be deposited in court at the time of taking. The act is the primary federal condemnation statute and the federal courts have since applied the 6 percent rate whenever the statute is invoked. In certain cases where the Government, for some reason, delays filing a "declaration of taking", the courts have applied the local legal rate of interest, if reasonable, under the *Rogers* rule, to cover the intervening period from loss of possession to the filing of the declaration of taking. *United States* v. *A. Certain Tract of Land in Chatham County, Ga.*, 47 F. Supp. 30 (1942) (7 percent Georgia).

The plaintiff here has strongly urged the Commission to adopt the 6 percent required by the Declaration of Taking Act as the proper and reasonable standard, as that act proclaims a legislative finding as to fair compensation for the taking of land. Plaintiff urges that it is grossly discriminatory to allow a lower rate in Indian tribal claims than in the cases where citizens generally are the condemnees.[5]

---

[5] This position has also been argued with great force by the plaintiffs in Docket 189, Red Lake Chippewa. We acknowledge the

We acknowldege the equitable appeal of the argument, and were this issue one of first impression we might well be guided by it. However, the Court of Claims has specifically rejected the analogy of the Declaration of Taking Act, *Shoshone Indians* v. *United States*, 85 Ct. Cl. 331, 380 (1937), and has declined to apply that rate of interest to the non-Indian cases of just compensation before it, *see* cases cited *supra*. We believe that the Court of Claims in its latest expression on the subject (*Ponca, supra*), has directed the Commission to make a broader comparison than adoption of a rate from an analogous but non-relevant statute. However, the statutory rate, like other rates used in various statutes,[6] is evidentiary as to the actual conditions of the cost of withholding money, which is the focus of our inquiry in finding an interest rate expressive of the damages required for just compensation.

It might be suggested that the Commission adopt the *Rogers* rule discussed above, using the legal interest rate of the state where the property was located. We deem it more proper that a single, national, uniform standard for Indian claims be adopted, reflective of the unique and exclusive relationship of the Federal Government and the Indian claimants.

The Commission then turns to determination of a reasonable rate of interest as damages where just compensation is due. We interpret the latest expressions of the Court of Claims (*Ponca, supra, Confederated Salish,*

---

helpfulness of the thorough briefing of this issue in those proceedings

[6] Plaintiff draws attention to several statutes setting 6 percent as the rate on various obligations to and of the United States, 31 U.S.C. § 505 (1970), 31 U.S.C. § 227 (1970), 28 U.S.C. § 2411 (1970). By regulation of the Secretary of the Interior, Indian tribes pay 5.5 percent interest on funds borrowed from the expert witness loan fund for Indian claims, 25 C.F.R. § 9121 (1964); *see* 25 U.S.C. § 70n-4 (1970).

supra) to require that relevant factual "economic data and other material" be considered in reaching the final conclusion on interest rate. In this case, we invited the parties to file further evidence relating to this inquiry. From the evidence submitted, and from complementary and supplementary statistical material of which we may take judicial notice, we have made a factual foundation for our conclusion.

As noted above, plaintiff urges that increased money market interest rates in recent years call for an upward revision of the 4 percent rate applied by the Court of Claims in recent years. Defendant, in submitting evidence on the money market in response to the Commission's order, argues that the best measure of just compensation is "the prime rate of interest in the money market," and that its evidence establishes a prime rate of 4 percent from 1880 to date.

Both parties urge the adoption of selected interest rate indexes as determinative of the just compensation rate. The Commission rejects the suggestion that any one available economic or interest rate index can be translated directly to a just compensation standard. That standard supposes that the condemnee had his money in hand to invest prudently but productively, and there is no reason to suppose that he should have invested only in the safest bonds, or in the most speculative stocks. An examination of Table 686 "Money Market Rates," *U.S. Department of Commerce, Statistical Abstract of the United States* 445 (92 ed. 1971), shows different levels of interest rates for different categories of obligation, e.g., higher rates on mortgages, lower rates on U.S. bills. No one such category expressing the money market is adequate to serve directly as expressing the rate the condemnee could have or should have realized had he the money for his property. Nor does there seem to be any reasonable criteria for selecting any group of cate-

gories to average. Defendant's construction of a "prime rate of interest" depends on selecting the safest and lowest-interest paying bonds, and improperly excluding investment possibilities involving greater risk but greater return or capital appreciation. Defendant's error illustrates the difficulty of directly translating money market rates to just compensation damages.

This difficulty is surmounted by the proper application of the legal precedents. The Court of Claims in a series of cases beginning in 1950 and extending through at least 1957,[7] made a determination that the proper relation between the just compensation rate and the economic activity between 1934 and the time the court spoke was expressed by a rate of 4 percent. We follow this determination and adopt a 4 percent as the base figure for comparisons for the period 1934 to 1950.

To measure what changes may have occurred between the depression period and the present day, an appropriate index must be selected. On examination of the evidence and the available statistical material, the Commission concludes that the average annual yield on long term U.S. Government bonds is the most appropriate to measure the changes in money market rates over long periods of time. The data is available for a long period, and shows that this yield-rate is generally lower than other rates available (although higher than some) and fluctuates less extremely over the years than other indexes, although it reflects the general ups and downs of the money market. (*See* Defendant's Exhibit X-20). This data represents the yield available on safe long term U.S. Government bonds.

---

[7] *Alcea, supra, Rogue River, supra, Uintah Ute, supra, Cf. Conf. Salish, supra,* where in 1971 the court affirmed such a finding, but expressly not on the merits.

In our Finding 50(d) we have tabulated these rates over the relevant years and have taken significant averages of various periods that allow the comparison of one period with another in terms of the change in the money market. The average yield for the period 1934 to 1950 is 2.47 percent compared to a yield for the recent period 1951 to 1971 of 4.05 percent, and a yield over the whole period 1934 to 1971 of 3.34 percent. Thus the period the Court of Claims equated with a 4 percent just compensation rate had a 2.47 percent bond rate. We may then calculate that the recent period's bond rate of 4.05 percent would call for a proportionate just compensation rate of 6.5 percent (X:4::4.05:2.47).*

The Commission does not find merit in the idea that the just compensation rate should be subject to such recalculation every 20 years, although we recognize that the greatest accuracy would be achieved by calculating a new rate for every year. For this type of judicial determination, however, there is an advantage of stability and convenience over extreme accuracy. Over the whole period 1934-1971 inclusive, calculations as above show the comparative just compensation rate to be 5.4 percent. It appears that in the long term 5 percent is a rate that conveniently averages the ups and downs of economic activity.

From the evidence as a whole, the Commission concludes that over the last 40 years 5 percent per annum is the appropriate rate to express the measure of just compensation when it is owing over the whole period. For

---

* Selection of the long term U.S. bond yields as the index figures is not indispensable to making this comparison; any component of the money market for which adequate data is available may be expected to reflect the same changes. For instance, the data on corporate bond yields show averages for 1934-1950 of 2.94 percent, for 1951-1971 of 4.62 percent, and for 1934-1971 of 3.87 percent. This produces proportionate just compensation rates of 4 percent, 6.3 percent and 5.25 percent respectively.

periods prior to that time, the economic data is not so definitive, but we note that comparable interest rates generally were substantially above those of the depression period for many years prior thereto (see Defendant's Ex. X-20 cited above). The available economic data is not inconsistent with a finding of 5 percent as the appropriate just compensation standard in earlier periods. However, the Court of Claims has declined to rest its just compensation interest determinations for periods prior to 1934 on economic data, but rather on the traditional use of that figure in Indian treaties, and we adhere to that ground in sustaining the usual practice of finding 5 percent as the appropriate interest for damages to achieve just compensation in that earlier period. Accordingly, our award to plaintiff for the taking of the subject school lands is for the sum of $1,191,895 calculated to June 30, 1972, together with an additional amount of compensation measured by simple interest at the rate of 5 percent per annum on the principal amount of $315,386 from June 30, 1972, to the date of payment of the principal sum. (See Finding No. 50.)

In computing the award due plaintiff for the Verendrye Monument lands, the Commission has adopted the method utilized by the Court of Claims in the case of *Uintah and White River Bands of Ute Indians, supra.* Thus, we have applied the $1,265.20 payment on the claim on February 14, 1920, in a manner that would reduce proportionately the principal and interest that had accrued at 5 percent from June 29, 1917, the date of taking to February 14, 1920. On this basis the $1,265.20 was sufficient to pay principal plus accrued interest (13.3 percent) upon $1,119.65 of the principal sum of $1,948. As to the balance of the principal, $828.00, no payment has been made and, therefore, that sum will draw interest at 5 percent from June 19, 1917 to June 30, 1972, and thereafter until the principal is

paid. Accordingly, plaintiff shall recover from defendant for the taking of the Verendrye National Monument tract the sum of $3,106 plus an additional amount measured by simple interest at 5 percent on the principal sum of $828.00 from June 30, 1972, until the date of payment of said principal.

For the taking of the St. Edward Mission lands by the defendant, plaintiff shall recover from the defendant the sum of $8,970, plus an additional amount measured by simple interest at 5 percent on the principal sum of $2,400 from June 30, 1972, to the date of payment of said principal.

VI. *Summary.*

For all the lands in suit, plaintiff shall recover from the defendant the sum of $8,809,057, as summarized below, plus an additional amount measured by simple ininterest from June 30, 1972, on the principal sums and

at the rates of interest determined herein until said principapl sums are paid.

Subject Lands	Principal Award	Interest to 6/30/72	Total
(a) Homestead Lands	$2,765,067	$4,840,019	$7,605,086
(b) School lands	315,386	876,509	1,191,895
(c) St. Edward Mission	2,400	6,570	8,970
(d) Verendrye Nat'l. Mon.	828	2,278	3,106
	$3,083,681	$5,725,376	$8,809,057

/s/ Richard W. Yarborough
RICHARD W. YARBOROUGH,
Commissioner

We Concur:

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL,
Chairman

/s/ John T. Vance
JOHN T. VANCE,
Commissioner

MARGARET H. PIERCE,
Commissioner

/s/ Brantley Blue
BRANTLEY BLUE,
Commissioner

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 2-66

Ind. Cl. Comm. Docket No. 350-F

16 Ind. Cl. Comm. 341 (1965)

(Decided February 16, 1968)

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, ET AL.

v.

THE UNITED STATES

Charles A. Hobbs, attorney of record, for appellant. *Wilkinson, Cragun & Barker, Donald C. Gormley, Francis L. Horn*, and *Jerry C. Straus*, of counsel.

Ralph A. Barney, with whom was *Acting Assistant Attorney General J. Edward Williams*, for appellee. *Walter J. Muir*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

OPINION

COLLINS, *Judge*, delivered the opinion of the court:

This is an appeal from an interlocutory order, findings of fact, and opinion of the Indian Claims Commission (hereinafter the "Commission"). Appellant claims that the United States, under the Act of June 1, 1910, 36 Stat. 455, deprived it of part of its reservation lands without the payment of just compensation and, in some instances, without the payment of any compensation. Under that act, to be discussed in more detail *infra*, the United States (1) sold part of the reservation to homesteaders and credited the proceeds of the sales to appellant; (2) purchased certain lands from the tribe, pursuant to an act of Congress, granting such lands to the State of North Dakota for school purposes; and (3) set aside certain small reserves on the reservation for public purposes.

The appeal also presents subsidiary questions concerning (1) the proper dates for valuing the lands in question and (2) whether compensation would be due for tracts set aside for the tribe by Executive orders.

Historical Background

The historical background of this case is fully set out by the Commission in its findings, 16 Ind. Cl. Comm. 341, 342-63. A short summary will suffice for our purposes. The Three Affiliated Tribes of the Fort Berthold Reservation (hereinafter "Fort Berthold Indians" or "appellant") constitute a corporate entity, which has succeeded to the interests of the Arikara, Gros Ventre, and Mandan Indian Tribes.

The lands disputed in this case are located in North Dakota and consist of a portion of Royce Area 713 and of Royce Area 716. Royce Area 713 was set aside for

the Fort Berthold Indians pursuant to the Executive orders of April 12, 1870, I KAPPLER 883 (2d ed. 1904), and July 13, 1880, I KAPPLER 883 (2d ed. 1904); Royce Area 716 was set aside pursuant to the Executive order of June 17, 1892, I KAPPLER 883 (2d ed. 1904). On December 14, 1886, Government representatives entered into an agreement with the Fort Berthold Indians by which the Indians would cede part of their reservation lands for $800,000. As to the diminshed portion of the reservation, the 1886 agreement provided that the members of the Fort Berthold Tribes would take individual allotments and the United States would hold the residue in trust for 25 years. At the end of the 25 years, the United States would convey the residue to the tribes in fee simple. This diminshed portion of the Fort Berthold Reservation is within Royce Area 713.

However, when the 1886 agreement was finally ratified by Congress on March 3, 1891, an important amendment was made regarding the residue land. The amendment provided that, after all individual allotments had been made, the residue of the land "shall be held by the said tribes of Indians as a reservation." Ch. 543, § 23, Art. X, 26 Stat. 1032, 1035 (1891). Thus, instead of providing for eventual conveyance in fee simple, the amendment conferred upon the Fort Berthold Indians a reservation title to residue lands.

This was the status of the lands when the Act of June 1, 1910, 36 Stat. 455, was approved. This act directed the Secretary of the Interior to dispose of, for the benefit of the Fort Berthold Indians, certain surplus lands (*i.e.*, lands not allotted or reserved) on part of the reservation in Royce Area 713. The act provided that, prior to sale, a Presidential commission would be appointed, which would have the responsibility of classifying and appraising the surplus lands in 160-acre tracts. Once the classifications and appraisals had been approved

by the Secretary of the Interior, the lands would be opened for settlement by Presidential proclamation and disposed of, at the appraised value, under the general provisions of the homestead and townsite laws of the United States. The net proceeds of the sale were to be paid into the United States Treasury to the credit of the Fort Berthold Indians. Pursuant to the 1910 act and acts supplementary thereto, approximately 327,000 acres of surplus land were sold at the appraised prices and the proceeds placed in an interest-bearing Treasury fund to the credit of the Indians.

Another important provision of the 1910 act granted to the State of North Dakota, for school purposes, sections 16 and 36 in each township, or any lands which the state might select in lieu thereof (sometimes referred to as "lieu lands") if section 16 or section 36 or parts thereof had been allotted, reserved, or were otherwise unavailable to the state. The act specified that the United States would pay the Fort Berthold Indians the sum of $2.50 per acre for lands in sections 16 and 36 so granted, or for the lands within the reservation selected in lieu thereof. Under this provision, approximately 29,000 acres were ultimately granted to the state, for which the Indians were paid the stipulated $2.50 per acre price.

Finally, the 1910 act also authorized the Secretary of the Interior to set aside other reservation lands for designated public purposes. The appellant complains that three small parcels (identified as St. Edward Mission, Shell Creek Reservoir, and Verendrye National Monument) were taken by the Government for public purposes.

The 1910 act was passed by Congress without any treaty or agreement on the part of the Indians.

The appellant filed suit in 1951 under the Indian Claims Commission Act, seeking just compensation for its land, under the theory that its land was taken within the meaning of the Fifth Amendment of the Constitution.

Taking of Indian Land Under the Fifth Amendment

Two important subsidiary issues hinge upon the resolution of the issue of whether the Indians' land was taken from them under the Fifth Amendment. The first concerns the criteria for determining liability. If a taking under the Fifth Amendment has occurred, then appellant is, of course, entitled to "just compensation." *United States* v. *Klamath Indians*, 304 U.S. 119 (1938); *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351 (1926); *Miami Tribe of Oklahoma* v. *United States*, 150 Ct. Cl. 725, 281 F. 2d 202 (1960), *cert. denied*, 366 U.S. 924 (1961). Excluding for the moment the question of interest, "just compensation" has been uniformly held to mean value at the time of taking. *United States* v. *Klamath Indians, supra.* Therefore, if a taking under the Fifth Amendment has occurred, appellant need only prove that it received a sum for its lands less (no matter how much less) than the fair market value thereof to be entitled to recover the difference.

On the other hand, if there has been no Fifth Amendment taking, appellant can recover, pursuant to the Indian Claims Commission Act,[1] only if it shows that

[1] 25 U.S.C. § 70a, provides, in part, as follows:

"The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a

moneys received from the sale of the lands were so far below the then fair market value thereof as to amount to fraudulent conduct, gross negligence, or some other breach of its fiduciary obligations on the part of the Government. A mere disparity is not sufficient. *Creek Nation* v. *United States*, 97 Ct. Cl. 602, 612 (1942), *cert. denied*, 318 U.S. 787 (1943); *Seminole Nation* v. *United States*, 92 Ct. Cl. 210, 216 (1940), *cert. denied*, 313 U.S. 563 (1941).

A second difference in result is that appellant would be entitled to recover interest on any claim arising under the Fifth Amendment to the Constitution. Interest from the time of taking is automatically included in order to satisfy the demands of the Fifth Amendment. *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476 (1937); *Uintah & White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1, 152 F. Supp. 953 (1957).

However, if no taking under the Fifth Amendment has occurred, then any recovery appellant might gain under the Indian Claims Commission Act would not bear interest. *Osage Nation of Indians* v. *United States*, 119 Ct. Cl. 592, 97 F. Supp. 381, *cert. denied*, 342 U.S. 896 (1951); *Loyal Band or Group of Creek Indians* v. *United States*, 118 Ct. Cl. 373, 97 F. Supp. 426, *cert. denied*, 342 U.S. 813 (1951).

---

court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as theresult of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *"

In deciding whether a particular transaction involved a taking under the Fifth Amendment, we are called upon to resolve a seeming conflict between two well-established lines of cases.

One line emphatically asserts the plenary power of Congress to manage and control tribal Indian affairs, including their lands and funds. "Congress possesses the exclusive and plenary authority to deal with tribal Indian lands and funds as in its wisdom it deems just." *Chippewa Indians of Minnesota* v. *United States*, 88 Ct. Cl. 1 (1938), *supplemental opinion*, 88 Ct. Cl. 43, 47, *aff'd*, 307 U.S. 1 (1939). "* * * Congress possess[es] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests * * *. * * * Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903).

In *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306 (1902), the Court took notice of "[t]he plenary power of control by Congress over the Indian tribes and its undoubted power to legislate * * * directly for the protection of the tribal property * * *."

Similarly, the Supreme Court recognized in *Chippewa Indians of Minnesota* v. *United States*, 301 U.S. 358, 375 (1937), that "* * * the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare * * *."

Finally, as the Court said in *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 310 (1911), "[T]he Congress of the United States has undertaken from the earliest history of the Government to deal with the Indians as dependent

people and to legislate concerning their property with a view to their protection as such."

Existing side by side with this line of cases espousing Congress' plenary power over Indian property is a line of cases holding that the Government did take Indian land in a constitutional sense and had to pay just compensation for it. See, *e.g., Shoshone Tribe of Indians* v. *United States, supra; United States* v. *Klamath Indians, supra; Uintah & White River Bands of Ute Indians* v. *United States, supra.*

It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interest, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

Some guideline must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action: Where Congress makes a good faith effort to give the Indians the full value of the land thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee. While not every word of every opinion can be harmonized with this guideline, it is basic to the holdings of at least the great majority of cases in this area.

Looking first at cases which upheld the plenary power of Congress over tribal property, the case of *Lone Wolf*

v. *Hitchcock, supra*, bears out the validity of such a guideline. This case involved a suit by Indians to enjoin the sale of "surplus" lands to the United States for $2,000,000, pursuant to the Act of June 6, 1900. The act incorporated an 1891 agreement with the Indians, which the Indians claimed was invalid because their proper assent had never been given.

The Supreme Court, upholding the Act of June 6, 1900, on the ground that the assent of the tribe was not necessary, gave the following rationale:

> * * * Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, *a mere change in the form of investment of Indian tribal property*, the property of those who, as we have held, were in substantial effect the wards of the government. * * * [Emphasis supplied, 187 U.S. at 568.]

In *Chippewa Indians of Minnesota*, 88 Ct. Cl. 1 (1938), *aff'd*, 307 U.S. 1 (1939), the Indians tried to recover amounts which Congress had disbursed from certain tribal funds accruing from the sale of surplus land. The expenditures were all for the benefit of the Indians, including, for example, educational and drainage facilities. The basis of the Indians' complaint was that an earlier act of Congress had provided that the funds were to be conserved for the benefit of the Indians, eventually to be distributed to the Indians. This court upheld the Government, holding that it had merely exercised its plenary power and authority over tribal property. We see no difference between the exchange in that case of funds belonging to the Indians for educational and drainage

facilities and the exchange in this case of land for money. Both involve a mere substitution of assets under Congress' plenary power over tribal property.

Another case indicating that the sale of tribal land for the benefit of the Indians falls under the plenary powers of Congress is *Fort Peck Indians* v. *United States*, 132 Ct. Cl. 373, 132 F. Supp. 222 (1955). The defendant was directed by statute to sell surplus land to white settlers "'* * * it being the intention of this Act [of May 30, 1908, § 13] that the United States shall act as trustee for said Indians to dispose of said lands. * * *'" 132 Ct. Cl. at 374, 132 F. Supp. at 223.

The Indians were seeking judgment against the United States because it had permitted a delay in the payments of principal and interest on the purchase prices and had reappraised some of the lands, which resulted in a reduction in the amount payable for the purchase of the lands.

This court agreed with the Indian Claims Commission that, notwithstanding the terms of the act, "Congress retained plenary power to deal with the Indian lands in such manner as it thinks is for the benefit of the Indians," 132 Ct. Cl. at 374-75, 132 F. Supp. at 223, and that the defendant had faithfully discharged its duty as guardian for its Indian wards.

Looking at some of the cases cited by plaintiff which held that a Fifth Amendment taking had occurred, there is no evidence that Congress, in any of those instances, was attempting to give the Indians the full value of the land. In three quite similar cases,[2] the Indian lands were erroneously surveyed by the Government and, as a con-

---

[2] *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Sioux Tribe of the Lower Brule Reservation* v. *United States*, 161 Ct. Cl. 413, 315 F.2d 378, *cert. denied*, 375 U.S. 825 (1963); *Seminole Nation* v. *United States*, 102 Ct. Cl. 565 (1944), *cert. denied*, 326 U.S. 719 (1945).

sequence, were subsequently disposed of by acts of Congress either by sale and patent to settlers or by allotment to other tribes. In each case, the Government, in dereliction of its fiduciary obligations, made no attempt to give the Indians any compensation. Similarly, in *Yankton Sioux Tribe of Indians* v. *United States*, 272 U.S. 351 (1926), after the United States had taken possession of Indian land, the Secretary of the Interior negotiated an agreement with the Indians to pay $100,000 for the land. However, Congress never ratified the agreement, so the Indians were paid nothing. Again, there was no attempt by Congress to transmute land to money for the Indians.

In several cases, the Supreme Court acknowledged the plenary power of Congress over Indian property but, nevertheless, went on to find that a taking had occurred. For example, in *United States* v. *Creek Nation*, 295 U.S. 103 (1935), where the United States sold Creek lands to settlers and to other Indians because of an erroneous survey, retaining the proceeds of the dispositions for itself, the Court gave the following rationale in holding that a taking had occurred:

> * * * The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation." * * * [295 U.S. at 109-10.]

In holding that confiscation involved disposing of Indian land without assuming an obligation to render just compensation, the Supreme Court employed a standard similar to the one adopted by this court in the instant case. Since just compensation is understood to mean fair market or full value, the Court in *Creek Nation* was distinguishing between guardianship and confiscation by pointing out that control over Indian property in a guardian-type capacity includes the obligation to pay the full value for the property. Since nothing was paid, the act was one of confiscation.

Part of the above-quoted language in the *Creek Nation* case was cited by the Supreme Court in *Shoshone Tribe of Indians* v. *United States*, *supra*, 299 U.S. at 497. The Court held that there had been an appropriation of Shoshone property within the meaning of the Fifth Amendment when the Government, by military force, permanently moved a band of Arapahoes onto the Shoshone Reservation. Again, the Government had made no effort to transmute the Indians' lost property rights into money.

In *Chippewa Indians of Minnesota* v. *United States*, 301 U.S. 358 (1937), the question was whether Congress could authorize several diverse tribes in a state to cede the land of one of the tribes to the United States, to be held for the benefit of all the tribes. The Court, in the following language, held that Congress could not:

> * * * Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own. * * * [301 U.S. at 375-76.]

In short, it is concluded that it is the good faith effort on the part of Congress to give the Indians the full value of their land that identifies the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its power of eminent domain by giving or selling Indian land to others, by *dealing with it as its own*, or by any other act constituting a taking.

Land Sold to Homesteaders

Turning now to the instant case, the Commission's determination on the criteria for liability (16 Ind. Cl. Comm. at 391) implies that the Commission was of the opinion that the lands sold to the homesteaders were not taken from appellant under the Fifth Amendment. We agree. The facts of this case establish that Congress was not taking Indian land and giving it to the settlers, but was making a good faith effort to transmute Indian property from land to money by giving the Indians the full money value of the land.

The act of 1910 itself stipulated that it was "the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof * * *." Ch. 264, § 14, 36 Stat. 458, 459. To insure impartiality insofar as possible, the act also provided for the appointment of a three-man commission, one of whom was to be a member of the tribe, to classify and appraise the land. There is no evidence or suggestion that the commission did not act in perfect good faith and do its best to find reasonable prices.

The fact that this commission came up with three separate classifications (agricultural land of the first class, agricultural land of the second class, and grazing land),

each with a different price range, reinforces the impression that the commission acted rather carefully.

Therefore, we hold that defendant is not liable to appellant for a taking of tribal lands within the meaning of the Fifth Amendment. As stated by the Indian Claims Commission, appellant can recover only if it can show that moneys received from the sale of lands were so far below the fair market value as to amount to fraudulent conduct or gross negligence.

The School Lands

The opinion of the Indian Claims Commission does not expressly accept or reject appellant's contention that a Fifth Amendment taking occurred in respect to the school lands. From this we assume the Commission rejected appellant's contention, for a finding of a Fifth Amendment taking would at least deserve mention.

At any rate, our own conclusion is that a taking did occur for which appellant is entitled to just compensation, including interest, subject, of course, to an offset for the amount already received.

As described above, the 1910 act directly granted to the State of North Dakota, for school purposes, sections 16 and 36 in each township or "lieu lands" outside these sections if those lands within sections 16 and 36 had been allotted.

The act further specified:

> * * * That the United States shall pay to the said Indians for the lands in said sections sixteen and thirty-six, so granted, or the lands within said reservation selected in lieu thereof, the sum of two dollars and fifty cents per acre. [Ch. 264, § 8, 36 Stat. 457.]

Pursuant to the above provision of the 1910 act, the Government immediately placed $100,000 to the credit of the Indians, said moneys being carried on the books of the Treasury under the heading, "Fort Berthold Reservation 3% Fund." At $2.50 per acre, this would cover the purchase of up to 40,000 acres.

There is no indication of how Congress arrived at the $2.50 figure. There was no attempt to classify the school lands, so the flat $2.50 per acre applied whether the school lands consisted of first or second class agricultural land or grazing land. Since sections 16 and 36 of each township were scattered geographically throughout the entire reservation, it is likely that they contained at least some agricultural land, which was appraised by the commission examining the homestead lands at prices up to $6 an acre. Also, the flat $2.50 per acre rate applied whether the state selected sections 16 and 36 or "lieu lands." It would seem the merest coincidence if the "lieu lands," which could be in any other unallotted sections of the township chosen by the state, were identical in nature and value to sections 16 and 36.

The conclusion is unavoidable that, with regard to the land given to the state, Congress simply said the land was worth $2.50 per acre, but made no effort to determine whether that was what the land was truly worth. In other words, $2.50 appears to be just the figure Congress wanted to pay. Congress apparently didn't even attempt to ascertain what type of land comprised the sections given to the state, let alone what it was worth. The simple designation of $2.50 per acre as the price Congress would pay the Indians for the land is to be contrasted with the careful effort Congress made with regard to the homestead lands to commute the Indians' land into money by giving them the full value thereof. Congress was not acting as trustee for the Indians with regard to the school lands, but was exercising its power

of eminent domain in order to grant this land to the State of North Dakota.

This holding necessarily rejects defendant's contention that there can not be a constitutional taking of lands as long as the United States had paid the Indians for such lands, regardless of the amount of the payment.

It is true that, in many of the cases where a taking was held to have occurred, defendant paid nothing for the land. However, a payment of nothing is merely the clearest and most extreme example of the failure of Congress to pay full value. It is the attempt to pay the full present market value of the land which gives the transaction the character of a trustee's conversion of one asset into another. There is no basis in reason to distinguish between no compensation, minimal compensation, or compensation arbitrarily determined. If Congress pays the Indians a nominal amount, or (as it did here) an amount arbitrarily arrived at with no effort to ascertain if it corresponds to the true market value of the land, then it cannot be said that Congress is merely authorizing the conversion of one form of tribal property to another. A necessary corollary to a mere change in the form of property is that both forms have the same, or at least nearly the same, value.

Moreover, the Government has frequently been held liable for just compensation under the Fifth Amendment, despite payment on its part to the Indians for the land taken. See *United States* v. *Klamath Indians, supra; Miami Tribe of Oklahoma* v. *United States*, 150 Ct. Cl. 725, 281 F. 2d 202 (1960), *cert. denied*, 366 U.S. 924 (1961); *Uintah & White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1, 152 F. Supp. 953 (1957).

One apparently contrary case is not in point. In *Pawnee Indian Tribe of Oklahoma* v. *United States*, 157

Ct. Cl. 134, 301 F. 2d 667, *cert. denied*, 370 U.S. 918 (1962), land excluded from the tribal reservation was paid for by a subsequent appropriation of Congress. The Indian Claims Commission granted recovery to the Indians on the basis that the consideration paid was unconscionable, but denied recovery of interest. 8 Ind. Cl. Comm. 648, 756-57 (1960). This court upheld the Commission's denial of interest with the following comment:

> The United States thus acquired this acreage by purchase and not by condemnation and, hence, plaintiff is not entitled to interest. [157 Ct. Cl. at 141, 301 F. 2d at 670.]

In our opinion, the court was not implying by the quoted statement that any payment automatically prevented the United States from being liable for a taking under the Fifth Amendment. Rather, the court was relying upon the particular facts of the case to reach the conclusion that there was no talking because the land was acquired by "purchase" in the conventional sense—*i.e.*, acquired for a consideration pursuant to an agreement by both parties. The court apparently based its conclusion upon the explicit holding by the Commission that there was "an implied agreement between the United States and the Pawnees that the * * * [land] should be taken by the United States with payment of compensation to the Pawnees for the area taken." 8 Ind. Cl. Comm. 648, 756 (1960). Of course, this conclusion lends no support to defendant here because there is no suggestion of an implied agreement in the instant case relating to the school lands.

Compensability of Executive Order Lands

The Commission held that the tribe lacked compensable title to a tract of land identified as Royce Area 716, and therefore that the tribe was not entitled to additional

compensation for the parcels within that tract which had been patented to homesteaders.

That tract was added to the Fort Berthold Reservation by the Executive order of June 17, 1892 (I KAPPLER 883). Thus, these lands were not covered by the Act of March 3, 1891, 26 Stat. 1032, described in the beginning of this opinion, which provided that certain residue land, including lands added to the reservation by the Executive orders of 1870 and 1880, would be held by the tribes as a reservation. In the view of the Commission, Congress, by confirming reservation title upon the tribes in the Act of March 3, 1891, expressly recognized appellant's interest in the lands added by the Executive orders of 1870 and 1880. Therefore, appellant did have a compensable interest in those lands,[3] but did not have a compensable title to the land added by the Executive order of June 17, 1892, since that land was added after the act of 1891, and Congress took no subsequent action to recognize the title of appellant to this land.[4]

This amounts to a holding by the Commission that Executive order title is not compensable, and with this holding the court must disagree.

In doing so, we pretermit any consideration of compensability under general Indian law, for we find it abundantly clear that Executive order title is compensable under the Indian Claims Commission Act. We need only look at the plain language of the statute which expressly provides that the Commission shall hear and determine "* * * claims in law or equity arising under the Constitution, laws, treaties of the United States, and *Executive orders of the President* * * *." [Emphasis supplied.] Ch. 959, § 2, 60 Stat. 1050, 25 U.S.C. § 70a. Similarly,

---

[3] 16 Ind. Cl. Comm. at 375.

[4] Finding 10, 16 Ind. Cl Comm. at 348.

section 24 of the act, now covered by 28 U.S.C. § 1505, gives this court jurisdiction of any claim accruing after 1946 arising under the "Constitution, laws or treaties of the United States, or *Executive orders of the President* * * *." [Emphasis supplied.] In the context of the Indian Claims Commission Act, "Executive orders of the President" must be a reference to those interests in lands bestowed upon Indians by Presidential Executive orders. The only conclusion that can be drawn from the inclusion of such interests in the act is that Congress must have intended to make them compensable. Otherwise Congress would be doing a meaningless act—granting the Indian Claims Commission and the Court of Claims jurisdiction to hear a class of cases for which no recovery can be had.

We have been referred to no legislative history which casts any doubts upon this common sense interpretation of the plain words of the statute.

Furthermore, while this court has never consciously addressed itself to the question of compensability of Executive order title under the Indian Claims Commission Act, we feel that the reasoning of this court in *Otoe & Missouria Tribe of Indians* v. *United States*, 131 Ct. Cl. 593, 131 F. Supp. 265, *cert. denied*, 350 U.S. 848 (1955), is equally applicable here. It was held that the Indian Claims Commission Act makes aboriginal title compensable despite the fact it was not compensable under general Indian law.[5] The court said (131 Ct. Cl. at 607, 609, 131 F. Supp. at 275, 276):

> * * * Congress wished to settle all meritorious claims of long standing of Indian tribes and bands whether those claims were of a legal or equitable nature which would have been cognizable by a court of the United States had the United States been

[5] See *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

> subject to suit and the Indians able to sue, or whether those claims were of a purely moral nature *not* cognizable in courts of the United States under any existing rules of law or equity. * * *
>
> * * * * *
>
> The court should give the statute the plain meaning indicated by its language unless that meaning is clearly at variance with the legislative purpose as manifested by the whole act and confirmed by the legislative history * * *. * * *

We note that aboriginal title was held compensable under the Indian Claims Commission Act even though it is not mentioned in that act. A fortiori, Executive order title should be compensable under the act, since the act does explicitly recognize it.

The Small Reserves

Appellant is also seeking compensation for three small tracts of land which were set aside for public purposes.

(a) St. Edward Mission.

This 160-acre tract upon which is located the St. Edward Mission was added to the tribes' lands by the 1870 Executive order. The tract was set aside for use by the Mission in 1889, by order of the Interior Department. On September 16, 1916, the United States issued a patent in fee simple for the land to the Bureau of Catholic Indian Missions. Appellant claimed the issuance of a patent constituted a constitutional taking of its land.

The Commission held that the land was taken back from the Indians in 1889, not 1916, and therefore, since the land was lost prior to the Act of March 3, 1891, confirming reservation title upon the tribes, the tribes had Executive order title only and, thus, lacked compensable title.

In our opinion, the Commission erred in failing to realize that, by the 1891 act, Congress recognized appellant's title to the Mission tract. The act decreed " 'That the residue of lands within said diminished reservation, after all allotments have been made as provided in article three of this agreement, shall be held by the said tribes of Indians as a reservation.' " Ch. 543, § 23, Art. X, 26 Stat. 1032, 1035. It is undisputed that the land occupied by the St. Edward Mission was located in the area of the "diminished reservation," and that it was not allotted to any members of the tribes. Since nothing in the act exempted the Mission tract from congressional recognition of appellant's title, the unambiguous words of the act compel the conclusion that this tract was "held by said tribes of Indians as a reservation" when it was patented to the Mission in 1916, without any compensation to the Indians, constituted a taking under the Fifth Amendment, for which appellant is entitled to just compensation.

(b) Shell Creek Reservoir.

This 490.81-acre tract was set aside for a reservoir site by the Secretary of the Interior on October 21, 1911, under the authority of the 1910 act, without payment of compensation. The Commission found, in effect, that there was a taking of this tract within the meaning of the Fifth Amendment and that appellant is entitled to just compensation therefor. The defendant has not taken issue with this holding, and we uphold it.

(c) Verendrye National Monument.

This 253.04-acre parcel was set aside by a Presidential proclamation issued on June 29, 1917. Under the Act of February 14, 1920, ch. 75, § 16, 41 Stat. 424, the Indians were paid $5 per acre for this land. The Commission found that the United States purchased these lands

for $5 per acre, and for purposes of determining whether the consideration was unconscionable, the date of valuation would be June 29, 1917, the date of the Presidential proclamation reserving the monument grounds. 16 Ind. Cl. Comm. at 365-66, 389.

We do not agree that the United States purchased this tract from the tribes. There is no evidence that the tribes agreed to the setting aside or to the amount appropriated by Congress in the 1920 act. The United States simply took possession and ownership of the land for itself in 1917, without the payment of compensation —the clearest case of a Fifth Amendment taking. *Uintah & White River Bands of Ute Indians* v. *United States, supra.* A unilateral appropriation of money several years later does not affect the character of the original taking. See *United States* v. *Klamath Indians, supra; Uintah & White River Bands of Ute Indians* v. *United States, supra;* and *Miami Tribe of Oklahoma* v. *United States, supra.* Accordingly, appellant is entitled to recover the difference between what the land was worth at the time it was taken and the amount that it was paid.

Valuation Dates

(a) Land sold to homesteaders.

The Indian Claims Commission concluded that the valuation dates for the lands sold to homesteaders should be the date when the particular homesteader actually entered and settled on the lands of his choice. Appellant takes the position that the date on which the Indians were divested of title is the date on which the land should be valued, and that is the date of patent or final certificate, citing *Creek Nation* v. *United States,* 302 U.S. 620 (1938), and several other cases.

We agree with the Commission. The cases cited by appellant were cases involving a taking under the Fifth

Amendment, and they stand for the proposition that the proper method of computing value for property taken is to base it on value at the time of the taking. The taking is deemed to have occurred when title in each individual homesteader became final—*i.e.*, when the final patent was issued. See *Creek Nation* v. *United States*, *supra*; *Yakima Tribe of Indians* v. *United States*, 158 Ct. Cl. 672 (1962).

However, these cases are not applicable because, in the instant case, no taking occurred. Therefore, we need not be bound by technical questions of passage of title, but instead can look to other relevant considerations. As a practical matter, appellant's permanent possession and use of the surplus, unallotted, and unreserved reservation lands terminated when the homesteader actually entered and settled upon the tract chosen by him. Although legal title remained in the Government until the patent issued, the entryman "was the lawful possessor clothed with an inceptive title * * *." *United States* v. *Buchanan*, 232 U.S. 72, 77 (1914). "From the making of his entry the homesteader has the right of possession as against trespassers and all others except the United States; he has also an inchoate title * * *. * * * [W]hen he has fulfilled the conditions imposed upon him and receives a patent vesting in him the complete legal title, this title relates back to the date of the initiatory act * * *." *Knapp* v. *Alexander-Edgar Lumber Co.*, 237 U.S. 162, 166-67 (1915).

Moreover, the value of the lands at the date the patents issued is completely irrelevant in terms of the main issue here. The United States sold these lands for the benefit of the Indians in its capacity as trustee over tribal property. As stated above in this opinion, appellant can recover only if it shows that moneys received from the sale of the lands were so far below the fair market value as to amount to fraudulent conduct, gross

negligence, or some other breach of defendant's fiduciary obligations. The question is then against what fair market value do you measure the money received. It is completely illogical to measure the money received against the value of the land at the time the patent was issued —which could conceivably be as long as 6 years from the time of purchase. The Government had no way of knowing what the value would be years after the sale; its obligation was to get a fair price at the time it sold the land. Thus, the money received must be measured against the value of the land on a date that has some relevance to the sale. We uphold the Commission's choice of the date of entry as the proper valuation date, since that is when the United States became committed to the sale and that is also the date marking the appellant's loss of permanent use and possession of the land.

(b) The school lands.

The act of 1910 provided that "sections sixteen and thirty-six of each township * * * are hereby granted to the State of North Dakota for school purposes * * *," and that if either of said sections were unavailable to the state, it could select other unreserved land in lieu thereof. Ch. 264, § 8, 36 Stat. 457.

The Commission found that the proper valuation date for all the school lands, both the "place lands" (sections 16 and 36 in each township) and the "lieu lands," shall be the effective date of the act (June 1, 1910). According to the Commission, when the Government, pursuant to the 1910 act, placed $100,000 in a fund for appellant, it purchased from appellant lands sufficient to cover the ultimate selection of up to 40,000 acres of school lands by the State of North Dakota. The Commission also reasoned that when defendant deposited $100,000 in the fund for appellant, the Indians no longer had any interest in the matter of when, where, and how the State

of North Dakota would make its school selections so long as no more than 40,000 acres of surplus unallotted land were selected.

We cannot agree with the Commission. The school lands were not "purchased," but were taken under the Fifth Amendment, entitling the Indians to just compensation—*i.e.*, value at the time of the taking. *United States* v. *Klamath Indians, supra.* The payment of $100,000 in 1910 did not settle title, but merely established an offset against the just compensation to which the tribe would ultimately be entitled. The Indians are suing for the taking of their ownership, and this did not occur until title passed to the state.

We agree with the Commission's choice of the 1910 act as the valuation date only for those "place lands" in sections 16 and 36 which had been surveyed by the date of the act. Since the act contained words of present grant, as to sections 16 and 36, the passage of the act itself conveyed to the state title to those lands in sections 16 and 36 which had already been surveyed.

As to the section 16 and section 36 lands which had not then been surveyed, since these could not be identified, the act could pass no title to them. Title to those lands was not acquired by the state until the surveying had been completed. *United States* v. *Wyoming*, 331 U.S. 440 (1947), and *Wisconsin* v. *Lane*, 245 U.S. 427 (1918). Since no title passed and since there is no evidence to suggest that the Indians were deprived of possession or enjoyment prior to the surveying, we hold that the completion of the surveying marks the date of the taking for these lands and therefore is the proper valuation date.

The "lieu lands" present an even stronger case. These lands had not been selected by the state at the time of the passage of the act. The law is well settled that,

where a state is given an option to select "lieu lands," title does not pass to the state until the lands are actually selected by the state. *McNee* v. *Donahue*, 142 U.S. 587, 601 (1892), and *Hedrick* v. *Hughes*, 82 U.S. (15 Wall.) 123, 129 (1872). Thus, no "lieu lands" were taken from appellant until actually selected by the state.

Also, it is unrealistic to say that, with the passage of the act and the deposit of $100,000 in 1910, the Indians no longer had any interest in when or where the state would make its school selections. Different sections would have different values, so the Indians had a very real interest in whether the state selected, for example, agricultural land worth $6 an acre or grazing land worth $1.50 an acre. It would be quite unfair to limit appellant to the 1910 value of land when the state made many selections several years thereafter, with the freedom to choose the most valuable land available and the knowledge of the latest values.

Therefore, we hold that, although the 1910 act was the underlying authority for the grant of school lands to the state, the grant could not take place, and appellant's property rights were not extinguished, until the "place lands" were surveyed and the "lieu lands" were selected from surveyed lands. It was held in the cases of *Creek Nation* v. *United States*, 302 U.S. 620 (1938), and *Seminole Nation* v. *United States*, 102 Ct. Cl. 565 (1944), *cert. denied*, 326 U.S. 719 (1945), that the date of taking is not the date of the statute authorizing disposition, but the date on which the lands are actually disposed of by the Federal Government. In those cases, the actual disposition was accomplished by conveying title through issuance of patents; in the instant case, disposition of the school lands occurred by passage of title to the three different categories of school lands in the manner outlined above.

Since the Commission erroneously ruled that the 1910 act marked the proper valuation date for all the school lands, it was not faced with the question of selecting an average date of valuation for school lands taken on varying dates. We remit this question to the Commission for its determination, consistent with this opinion.

(c) The small parcels.

As was stated *supra*, the act of 1891 gave appellant recognized title to the St. Edward Mission land, which title appellant lost when a patent was iussed to the Mission on September 16, 1916. The issuance of the patent constituted a taking, and thus the proper valuation date is the September 16, 1916, taking date.

The parties agree with the Indian Claims Commission that the date of valuation for the Shell Creek Reservoir should be October 21, 1911, the date the tract was set aside by the Secretary of the Interior. The parties also agree with the Commission that the proper valuation date for the Verendrye National Monument lands should be June 29, 1917, the date of the Presidential proclamation setting aside the monument grounds. Since the court also finds itself in agreement, we uphold the Commission on these issues.

Selection of an Averay Valuation Date

Appellant contends that the Commission should have selected one average date for the purpose of valuing all the lands taken under authority of the act—*i.e.*, the school lands, the lands sold to homesteaders, and the small parcels. Appellant cites *Creek Nation* v. *United States*, *supra*, 302 U.S. at 622, as authority for the proposition that land taken from an Indian tribe by a number of small sales should be valued on an average date. Instead, the Commission ruled that each of the small parcels was to be valued as of the date it was set aside, the

school lands were to be valued as of the effective date of the 1910 act, and the homestead lands were to be valued as of four different dates—the average date of entry covering all the recorded sales in each of the four separate offerings to settlers.[6]

Although we have already rejected the date of the 1910 act as the proper valuation date for all school lands, we do uphold the refusal of the Commission to select one average date for all the lands, since this is a decision within its discretion. Appellant is not contending that the Commission had the authority to select an average date, but that the Commission was legally bound to do so. However, in the *Creek Nation* case, cited by appellant, the Supreme Court did not lay down a mandatory rule requiring the adoption of an average date, but held only that an average date "may be adopted" in order to avoid burdensome detailed computations. 302 U.S. at 622. Also, in the *Creek Nation* case, there was more of a continuous sales process than is true in the instant case. Here the act of 1910 divided the lands into different categories and made provision for the sale of some of the retention of others accordingly. Subsequent legislation authorized the disposition of lands which had previously been reserved.

---

[6] Under the provisions of the 1910 act, about 205,000 acres of surplus, unallotted, and unreserved reservation lands were duly appraised and offered for homestead sale and entry, beginning on May 1, 1912. Under the provisions of the Act of August 3, 1914, 38 Stat. 681, about 111,000 acres of the land that had been reserved from sale under the 1910 act because they were coal bearing were reclassified, appraised, and offered for sale to homesteaders and became subject to entry on May 1, 1916. On September 6, 1916, approximately 7,000 acres of land, which had been previously omitted from classification and appraisal, were opened for settlement and made available for entry beginning November 13, 1916. By the Act of March 3, 1917, 39 Stat. 1131, about 9,000 acres of land lying within sections 16 and 36 and previously withheld pending determination of school land claims of the State of North Dakota were, upon reappraisal, offered for homestead sale and entry.

In essence, by requiring several valuation dates instead of one, the Commission was requiring a higher degree of accuracy than appellant's one average date would have given. The refusal to depart from accuracy for the sake of convenience would seem peculiarly a matter of discretion, depending on the particular facts of the case, and we cannot say that the Commission abused its discretion here.

Summary

In summary, the court holds:

(1) The land the Government sold and patented to homesteaders, including the Executive order laid in Royce Area 716, was not taken under the Fifth Amendment of the Constitution, but was disposed of pursuant to the authority which Congress exercises over Indian tribal property. Appellant is entitled to recover only if it can show that the price at which the Government sold those lands was so far below the fair market value as to constitute gross negligence, fraudulent conduct, or an abuse of the Government's fiduciary relationship.

(2) The lands taken by the Government and given to the State of North Dakota for school lands and the lands set aside for the St. Edward Mission, for the Shell Creek Reservoir, and for the Verendrye National Monument did constitute a taking under the Fifth Amendment, and appellant is entitled to just compensation, including interest, less any compensation heretofore paid by defendant.

(3) The valuation dates for the several takings are as follows:

(a) The average date of entry for the lands sold to homesteaders shall be computed separately for each of the four different entries;

(b) For the school lands, the court finds that the proper valuation date is the day on which title passed—

(i) June 1, 1910, the date of the 1910 act, for those "place lands" (sections 16 and 36) previously surveyed;

(ii) The date of the completion of the surveying for the remainder of the "place lands";

(iii) The date the state made its selection of previously surveyed "lieu lands";

(c) For the taking of St. Edward Mission, September 16, 1916;

(d) For the taking of the Shell Creek Reservoir, October 21, 1911; and

(e) For the taking of the Verendrye National Monument, June 29, 1917.

The determination of the Indian Claims Commission is affirmed in part, reversed or vacated in part, and remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed or vacated in part, and remanded.

APPENDIX D

16 Ind. Cl. Comm. 341

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 350-F

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, ET AL.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Decided: November 4, 1965

Appearances:

Donald C. Gormley, Attorney of Record for Petitioner.

William D. McFarlane, with whom was Mr. Assistant Attorney General, Edwin L. Weisl, Jr., Attorneys for the Defendant.

OPINION OF THE COMMISSION

WATKINS, Chief Commissioner, delivered the opinion of the Commission.

The claims asserted in the amended petition filed in this case arise basically from the Act of June 1, 1910, 35 Stat. 455. The petitioner is a corporate entity, The Three Affiliated Tribes of the Fort Berthold Reservation. This Wheeler-Howard entity is the successor in interest to three separate tribes, the Arikara, Gros Ventre, and Mandan, who for many years occupied

lands on the old Fort Berthold Indian Reservation in North Dakota. During the period in which these claims arose, and prior thereto, the three tribes were known collectively as the Fort Berthold Indians and for the sake of convenience we may at times identify the petitioner in the same manner. The petitioner, however, has the right and capacity under the Indian Claims Commission Act to bring and maintain these claims in its own behalf.

The substance of petitioner's claims is that it had a compensable interest in the Fort Berthold Reservation lands at the time of the passage of the Act of June 1, 1910, and that under this Act the United States deprived the petitioner of a goodly portion of its reservation lands without the payment of just compensation, and in some instances without the payment of any compensation. According to the petitioner tribe, the United States had assumed the role of trustee under the 1910 Act for the purpose of selling parts of petitioner's reservation to homesteaders and crediting the proceeds of the sales to the petitioner, but, in failing to procure the fair market value of the lands thus sold, the United States breached its fiduciary obligations, and its conduct in this regard did not comport with the concept of fair and honorable dealings. It is the petitioner's intention at a subsequent hearing to prove that the Fort Berthold Reservation lands sold by the United States were in fact worth a great deal more than what was ultimately realized from the sale of said lands.

Petitioner, of course, does not deny Congress' plenary authority to open up Indian reservation land for homestead entry and settlement, even without the consent of the Indians, but petitioner does expect that, when such tribal property rights are taken from the Indians, they are entitled to be paid just compensation. With this general proposition the Commission is in full agreement.

As the Commission sees it, the ultimate issue will be whether or not in disposing of petitioner's surplus reservation land by opening them up for sale and entry to homesteaders, the United States did obtain for the benefit of petitioner tribes compensation for said lands comparable with their then fair market value, and that, in carrying out its assumed obligations under the 1910 Act of Congress the United States did not act in a grossly negligent way, or profit in a manner inconsistent with its fiduciary role, or take unfair advantage of said tribe. Defendant, of course, insists that its conduct was exemplary at all times when it disposed of petioner's surplus reservation lands for the benefit of the petitioner tribe.

At this stage of the proceedings the Commission must first of all determine whether or not the petitioner tribe did in fact have a compensable interest in the Fort Berthold Indian Reservation lands. If the petitioner does have compensable tribal rights in the Fort Berthold reservation lands, then we must determine just what lands were sold and when they were sold. This latter question is most important since it establishes the controlling data for valuation purposes.

The Commission has set out in some detail in its findings the historical background leading up to the establishment of the Fort Berthold reservation lands that lie north and east of the Missouri in North Dakota. Under the 1851 Fort Laramie Treaty the Arikara, Gros Ventre, and Mandan tribes of Indians had been granted a reservation south and west of the Missouri River in Montana and North Dakota (Royce Area 300). Because of continuing intertribal hostilities, as well as trouble with on-coming white settlers, the United States in 1866 sought to obtain land cessions from these three tribes. However, these treaty efforts met with failure. Thereafter through a series of executive orders the

reservation lands originally set apart for the 1851 Fort Laramie Treaty participants were rapidly diminished by being restored to the public domain. At the same time acreages outside the delimited Fort Larmie Treaty boundaries were granted to Arikara, Gros Ventre, and Mandan tribes including lands north and east of the Missouri River in North Dakota (Executive Orders of April 12, 1870; July 13, 1880; Royce Areas 621, Dakota 1, 622 Montana 2).

Further diminution of the reservation lands in Montana and North Dakota was in the offing, when by the Act of May 15, 1886, 24 Stat. 29, Congress appropriated some $15,000 for the purpose of treating with the Indians in northern Montana and at Fort Berthold. On December 14, 1886, an agreement was entered into with the Arikara, Gros Ventre, and Mandan tribes of Indians wherein it was contemplated that for $800,000 the Indians would cede those Fort Berthold reservation lands "lying north of the Forty-eighth parallel of north latitude, and also that portion lying west of a north and south line six miles west of the most westerly point of the big bend of the Missouri River, south of the forty-eighth parallel or north latitude." (26 Stat. 989) The area ceded is readily identified as Royce Area 712, Dakota 3. As to the diminished portion of the reservation this 1886 agreement contemplated that all members of the three tribes would take individual allotments and the United States would then hold the residue in trust for twenty five years. After twenty five years the United States would convey the same to the tribes in fee simple. The diminished portion of the Fort Berthlod Reservation can be identified as Royce Area 713, Dakota 3, and it is within this area that most of the lands in the present controversy are located. The 1886 agreement was finally ratified by Congress on March 3, 1891, with the passage of the 1892 General Appropria-

tion Act covering the expenses of the Indian Department, 26 Stat. 989.

However, the agreement as ratified contained an important amendment in Article VI thereof, which dealt with the residue land. This amendment provided that, after all individual allotments had been made, the residue of the land "shall be held by the said tribes of Indians as a reservation." (I Kapp. 428). By this slight modification in the original text of the agreement, Congress clearly intended to confirm upon the Fort Berthold Indians a reservation title to residue lands in lieu of a possible fee simple title. The net result was that by this 1891 Act the Fort Berthold Indians for the first time acquired a compensable interest in the unallotted surplus portion of their diminished reserve situated within Royce Area 713, which compensable interest they maintained at the time of the enactment of the Act of June 1, 1910.

With respect to small additions made to petitioner's reservation by the Executive Order of June 17, 1892, said area being Royce Area 716, Dakota 3, the Commission has found that there was no subsequent action taken by Congress to recognize title thereto to be in the Fort Berthold Indians. Thus, petitioner never acquired any compensable interest in this executive order land, and we therefore shall exclude it from consideration in a claim for additional compensation. In so doing the Commission rejects as untenable petitioner's further contention that because of the decision in the case of *Indians of the Fort Berthold Indian Reservation in the State of North Dakota, et al.*, v. *United States*, 71 C. Cls. 308 (1930), the defendant is estopped from denying petitioner title to the entire area comprising the diminished Fort Berthold Reservation.

In the Fort Berthold case the plaintiff Indians brought suit to recover compensation for some 11,424,512.76

acres of land that had been deducted by executive orders from their permanent reservation. In determining the net deduction from the plaintiffs' original reservation for which no compensation had been paid, the Court of Claims subtracted from the total acreage figure above some 1,578,325.83 acres of land that had been added to the plaintiffs' reservation by the Executive Orders of April 12, 1870; July 13, 1880; and July 17, 1892. Thus, argues the petitioner, in the *Fort Berthold* case the Court of Claims in effect found that the land given to the Fort Berthold Indians by these three executive orders was as compensable as the lands that had been taken by the United States, and, since the same executive order lands are involved in the claims asserted herein, the defendant is estopped to contest petitioner's compensable interest therein. While this contention is an interesting one, we think it is abundantly clear, and the courts have so held, that the Constitution places the authority to dispose of public lands exclusively in the hands of Congress and it follows that only Congress can create a beneficial interest or recognize a tribal interest in said public lands, *Sioux Tribe of Indians*, v. *United States*, 316, U.S. 317. Certainly the Court of Claims in the *Fort Berthold* case could not do indirectly what it had no authority to do directly, that is, award a compensable interest to the Indians in executive order land. Furthermore, we think the petitioner has given a rather extreme interpretation to say the least, of the effect of the Court's action in deducting the executive order land from the land upon which the Court's judgment would be rendered. In making the deduction of these executive order lands, the court observed that most of it had been ceded to defendant, and payment had been made to the Indians.

In 1907 there still remained 884,780 acres of unallotted land on the diminished Fort Berthold Indian Reservation. By the Act of March 1, 1907, 35 Stat.

1015, the Secretary of the Interior was authorized to allot a minimum of 80 acres to those Indians who had not yet received any allotments and to increase to 80 acres the allotments of those Indians who received less than 80 acres. Three years later the Act of June 1, 1910, 36 Stat. 455, was approved whereby the Secretary of the Interior was authorized and directed after survey to sell and dispose of, for the benefit of the Fort Berthold Indians as provided in the Act, "All the surplus unallotted and unreserved lands within that portion of said reservation lying and being east and north of the Missouri River." (Sec. 1, 36 Stat. 355) The Secretary was further empowered to make additional allotments of either 160 acres of agricultural land or 320 acres of grazing to each member of the several tribes then living on the diminished reservation. Among other things of note, the Secretary of the Interior was authorized to reserve coal bearing or other mineral lands from allotment or other disposition until Congress provided otherwise; reserve lands for agency, school and religious purposes; reserve tracts of land found to be valuable for power or reservoir sites; and, to set aside and reserve all timber lands as a tribal forest to be used by the Indians. Under the 1910 Act the State of North Dakota was granted Sections 16 and 36 in each township for school purposes, or the right to select lands in lieu thereof if tracts situated in Sections 16 or 36 had been allotted or reserved. The 1910 Act provided for the appointment of a Presidential commission that was charged with the responsibility of classifying and appraising in 160 acre tracts where possible all the surplus, unallotted and unreserved lands before they would be offered for public sale and entry. Following approval of the classifications and appraisals it was provided that said lands would be opened for settlement and entry by presidential proclamation and disposed of under the general provisions of the homestead and townsite laws;

said lands to be sold at the appraised price and the net proceeds to be paid into the Treasury to the credit of the Fort Berthold Indians.

Nothing in the 1910 Act bound the United States to purchase any of the Fort Berthold lands except Sections 16 and 36 thereof, or lands in lieu thereof, which lands the United States had granted to the State of North Dakota for school purposes. For these school land selections the United States obligated itself to pay the Indians at a rate of $2.50 per acre. The 1910 Act provided for an immediate appropriation of $100,000 for this purpose, which amount was duly appropriated and placed in the Treasury to the credit of the Fort Berthold Indians. It was further provided under the 1910 Act that the United States would not guarantee to find purchasers for said lands or any portions thereof, and as set forth in the statute:

> "* * * it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expand and pay over the proceeds received from the sale thereof only as received and as herein provided." (Sec. 14, 36 Stat. 455)

Following approval of the Act of June 1, 1910, the President, pursuant to Section 7 thereof, appointed a three man commission to classify and appraise the surplus, unallotted, and unreserved lands on the Fort Berthold Indian Reservation. To insure impartiality insofar as possible, the commission was composed of one individual having tribal relations with the Indians, one from the Interior Department, and the third person to be a resident citizen of the State of North Dakota. The appraisal committee finished its task in June of 1911 and its unanimous recommendations as to classifications and appraisements were immediately approved by the Interior Department. Thereafter a presidential proclama-

tion was issued on June 29, 1911, declaring all surplus, unallotted, and unreserved lands subject to disposal under the general homestead laws and the provisions of the 1910 Act, said lands to be opened for entry and settlement as prescribed in the proclamation no earlier than May 1, 1912. At the same time regulations were promulgated by the General Land Office setting up the procedures to be followed by persons eligible to purchase Fort Berthold land. Purchasers were required to pay the appraised price for the lands selected, and a schedule of the lands subject to entry was made available to prospective purchasers. This schedule showed approximately 205,000 acres more or less, would be subject to disposal under the following classifications and prices: agricultural lands of the first class, designated as "A-1", $4.25 to $6.00 per acre; agricultural lands of the second class, designated as "A-2", $2.25 to $4.00 per acre; and grazing land designated as "G", from $1.50 to $2.00 per acre. The initial date of entry was set for May 4, 1912.

The evidence in this case clearly shows that practically this entire offering was sold and entered upon within a year to a year and a half of the May 4, 1912, opening date of entry, and that these purchasers eventually obtained a patent for their land.

On August 3, 1914, additional legislation was adopted authorizing the disposal of the coal bearing lands that had been reserved under the 1910 Act. In line with the procedure that followed under the 1910 Act, a new three man appraisal commission was formed, and on August 12, 1915, the appraisal commission finished its task of classifying and appraising all of these coal lands. Following the official approval of the commission's unanimous recommendations as to classification and appraisements, some 110,818.28 acres of previously reserved coal lands were declared subject to homestead entry and settle-

ment beginning on May 1, 1916. Prices to be paid for these lands ranged from as low as $2.50 per acre for grazing land to as high as $8.00 per acre for first class agricultural land. However, the bulk of this particular offering was second class agricultural land appraised at an average per acre price of about $5.26 per acre. The evidence in the record shows that between May and September of 1916, nearly all of the lands offered under the 1914 Act were sold and entered upon by homesteaders.

Following the land offerings under the 1900 and 1914 Acts, two smaller blocks of Fort Berthold lands were made available to homesteaders for entry and settlement.

On November 13, 1916, some 6,848.49 acres of surplus, unallotted and unreserved land that had been previously omitted from classification and appraisal were opened for settlement. Most of it was grazing land appraised at $3.00 to $4.50 per acre; the remainder being second class agricultural land appraised at $4.50 to $6.00 per acre. As far as the Commission can determine from the evidence at hand, approximately 3500 acres, more or less, were sold and ultimately patented, with most of the entry dates occurring between November 1916 and September of 1917.

The next block of Fort Berthold lands released for homestead sale was the coal bearing lands lying in Sections 16 and 36, which lands had been classified and appraised pursuant to the 1914 Act but thereafter withheld pending satisfaction of the school land claims of the State of North Dakota. With the apparent completion of the school land selections, the Act of March 3, 1917, 39 Stat. 1131, was passed authorizing the disposal of the previously reserved lands in Sections 16 and 36. Pursuant to the 1917 Act there was made available for homestead entry and settlement, beginning on

April 7, 1917, some 9,006.08 acres in Sections 16 and 36, ranging in price from as low as $3.00 per acre for grazing land to as high as $10.00 per acre for first class agricultural land. An examination of a Government Accounting Office report and other evidence in this case shows that 8,121.00 acres of land offered under the 1917 Act were sold and patented, and nearly all of the land sold had been entered upon in May of 1917.

On May 10, 1920, Congress enacted a statute authorizing the disposal by public auction of isolated tracts of land on the Fort Berthold Indian Reservation that had originally been opened for homestead entry under the 1910 Act (Commission's Finding 24). However, there is insufficient evidence in the record to make any accurate determination of just what lands were ever sold under this 1920 Act.

Now the petitioner has contended that for purposes of evaluating all Fort Berthold surplus unallotted land that was sold to homesteaders under the 1910 Act and the subsequent Acts, the date of patent is the controlling date for each sale.* Petitioner cites as its authority the case of *Creek Nation* v. *United States*, 302 U.S. 620 (1938). That the determination of the so-called "date of taking" or valuation date is vital to petitioner's case is made patently clear in petitioner's brief wherein it is stated:

> The situation presented here, as petitioner will show in a subsequent hearing, is that the sums received for the sale of the land sold to the homesteaders were for less than the fair market value of the land at the time that petitioner lost title.**

---

* A brief check of the sales recorded in Defendant's Exhibit 95 shows that the majority of successful purchasers of this Fort Berthold land obtained their patent from three to five years after making their entries. Some waited even longer.

** P. 21, Petitioner's Proposed Findings of Fact and Brief.

In the *Creek Nation* case cited by the petitioner we find that as a result of an 1872 erroneous survey of lands owned in *Fee simple* by the Creek Nation, Creek land was included within an area set apart for other tribes. Thereafter under an agreement with the United States, these tribes ceded their lands in exchange for individual allotments. The Act of February 1891, 25 Stat. 749, which ratified the agreement, provided for the disposition of the surplus, unallotted land to homesteaders by sale and entry. Under the 1891 Act fee simple land actually belonging to the Creek Nation was sold and patented to homesteaders. The Supreme Court in affirming the right of the Creek Nation to recover from the United States for the erroneous taking of its lands, fixed the date of the issuance of the patents as the date of valuing said lands, reasoning that:

> The Act of 1891 did not dispose of the lands. Its erroneous application and the consequent disposals of the lands to adverse holders constituted the taking by the United States.

But we think the situation in the instant matter to be a far cry from that before the Court in the *Creek Nation* case. The acts complained of, to wit, June 1, 1910, August 3, 1914, March 3, 1917, and May 10, 1920, did dispose of a good deal of petitioner's land, and as far as the evidence shows, there was no erroneous application of these acts. In our judgment the most important distinction between the Creek Nation case and petitioner's present situation is the nature of petitioner's interest in lands subject to disposal under the above acts. The Creek Indians enjoyed fee simple title in their lands, having full and complete ownership, while the petitioner had only a reservation title to the Fort Berthold lands, the fee remaining at all times in the United States. That the Courts have at times recognized the substantial difference in legal effect between fee owner-

ship and reservation title is clearly demonstrated in the case of *Seminole Nation* v. *United States*, 102, C. Cls. 565 (1946). This case was identical in many respects to the *Creek Nation* case cited by the petitioner. In the *Seminole* case, the Seminole Indians were also the victims of an erroneous survey of their boundary lines, and they too ultimately lost a portion of their reservation that they held in fee title when individual allotments were granted to Pottawatomies and the surplus was sold and patented to white settlers. The Court of Claims applied the same rule as laid down earlier in the *Creek Nation* case by fixing the valuation date of the lost Seminole lands as of the date of the patents. In so doing, the Court, speaking through Judge Whitaker, rejects defendant's argument that the taking occurred when the Seminole lands were actually settled. As stated by the Court:

> The defendant says that under the authority of *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476; the taking occurred when the Pottawatomies were settled on the land in 1872. In that case plaintiff had the right to use and occupancy only; in this case the plaintiff owned the fee in the lands. This right of use and occupancy in the *Shoshone* case was first impaired when the Arapahoes were settled on their lands, over the protest of the Shoshones, and, hence, it was held that their rights in the lands had been taken as of this date. In the case at bar, plaintiff does not sue for its loss of use and occupancy while the Pottawatomies occupied the lands as a reservation, it claims the fee and sues because it has been divested of this fee. It is entitled to recover as of the date of divesture. This occurred when the lands were disposed of pursuant to the agreement with the Pottawatomies under which the Seminole lands were conveyed to the United States.

In the case at bar the petitioner can claim only a possessory interest in the Fort Berthold Reservation,

albeit a possessory interest guaranteed more permanent than aboriginal title, but still only a possessory interest. Here the United States, in a proper exercise of its plenary authority over the affairs and property of the Fort Berthold Indians, and for the benefit of said Indians, chose to quiet petitioner's possessory rights to its surplus lands by selling them off to homestead settlers and crediting petitioner with the proceeds of said sale. Since the fee title was always in the United States, the Commission is of the opinion that petitioner's permanent possession and use of the surplus, unallotted and unreserved reservation lands terminated under the 1910 Act, and subsequent acts, either as a matter of law at the time the lands were declared open for entry, or certainly as a matter of fact when the particular homesteader, having made his purchase, actually entered and settled on the lands of his choice. As a practical matter then the Commission will accept an average date of entry covering all the recorded sales in each of the four offerings of surplus land made to homesteaders as reasonable dates for valuation purposes if said lands are to be valued at some future date.

The parties herein have apparently agreed that the sum total of reservation lands disposed of under the 1910 and subsequent Acts of Congress amounts to 326,540.45 acres (Def. Ex. 95). However, the Commission will leave to the parties the additional task of supplying to the Commission a breakdown of the total acreage by showing the number of acres entered and disposed of under each of the aforementioned acts.

Turning now to the school land disposals, we find that the petitioner has contended that in arriving at an appropriate date of taking for valuation purposes, it is necessary to consider first of all the dates of survey for the so-called "place lands", being those lands reserved within Sections 16 and 36, and secondly, the dates of selection for "lieu lands" being those lands selected out-

side of Sections 16 and 36. Then by combining the average dates of the place lands and lieu lands, an over-all average date of taking can be calculated. The Commission believes that this approach misconceives petitioner's actual interest in the school land selections. As we pointed out earlier in this case the United States under the 1910 Act purchased for $2.50 per acre petitioner's interest in at least 40,000 acres of reservation land that might be necessary to satisfy the school land selections of the State of North Dakota. Thus we find that when defendant deposited $100,000 in the United States Treasury to petitioner's credit, the Indians no longer had any interest in the matter of when, where, and how the State of North Dakota would make its school selections as long as no more than 40,000 acres of surplus unallotted land was selected. The Commission has found from the evidence that including both "place" and "lieu" lands, the State of North Dakota ultimately took 29,482.03 acres to satisfy its school land selections, and that petitioner's title to this acreage was quieted as of the effective date of the 1910 Act. It is this date, that is the date of taking, or valuation date for the school lands.

The petitioner also contends that the consideration for the school lands was not the $2.50 the United States said it would pay for them, but a $1.48 per acre, which is the amount the Indians actually received due to an erroneous award of a claimed offset against the judgment obtained by the Fort Berthold Indians in the case of *The Fort Berthold Indians* v. *United States*, 71 C. Cls. 380 (1930). The Commission, however, is of the opinion that if an erroneous offset caused an unwarranted deduction against the judgment in favor of the Indians in the *Fort Berthold* case this error can be corrected by a simple accounting or by proper adjustment at offset time in the event petitioner should obtain an award herein. In any event the consideration for the purchase of the

school lands was fixed in the 1910 Act by Congress at $2.50 per acre, and money which was more than sufficient to cover the total school selections was at that time deposited to the credit of the Fort Berthold Indians.

The petitioner is also seeking compensation for four small reserved tracts of land on the Fort Berthold Reservation totalling 1,223.85 acres. The four reserves consist of the following: St. Edward Mission, 160 acres; Shell Creek Reservoir, 490.81 acres; McLean National Wildlife Refuge, 320 acres, and the Verendrye National Monument, 253.04 acres.

The 160 acre tract upon which is located the St. Edward Mission was originally set aside on July 30, 1889, by order of the Interior Department. At this time the Fort Berthold Reservation had been established as an executive order reservation. It was not until the approval of the Act of March 3, 1891 (10 Stat. 1032) that Congress conferred on the Fort Berthold Indians a reservation title and a compensable interest in their lands. What evidence there is in the record indicates that the St. Edward Mission continued to exist and serve the Fort Berthold Indians at the same location throughout the years following its inception. We can only conclude that the mission land was not set aside under the provisions of the 1910 Act or any act of Congress at a time when the Indians had a compensable interest in the Fort Berthold Indian Reservation. The fact that on September 16, 1916, the Bureau of Catholic Indian Missions received from the United States Government a fee simple patent to the St. Edward Mission tract does not create a compensable interest in the land in favor of the petitioner for which they can now claim compensation. The Commission therefore disallows petitioner's claim for the St. Edward Mission tract.

With respect to the Shell Creek Reservoir site of 490.81 acres, the Commission finds that this area was specifically

set aside in accordance with the provisions of the 1910 Act. The land was reserved not for the exclusive benefit of the Fort Berthold Indians but for general public purposes. The Indians were not paid for the land, and are entitled to compensation based upon the fair market value of said reservoir site as of October 21, 1911, which is the date administrative approval was given reserving said land.

The McLean National Wildlife Refuge site was set aside by presidential order on June 12, 1939. However, this tract of 320 acres is located on the west half of section 16 in Township 150 N. Range 88W. Apparently this entire section had already been granted to the State of North Dakota for school purposes under the 1910 Act when it was set aside in 1939 as a wildlife refuge. There is nothing in the evidence indicating the contrary. This being the case, the petitioner had no interest in this tract in 1939, and this acreage should be included, if it has not been included, in petitioner's claim with respect to the school lands.

On June 29, 1917, a presidential proclamation set aside 253.04 acres of petitioner's reservation land as a national monument in recognition of the exploits of the French explorer, Verendrye. Under the Act of February 14, 1920, the petitioner was paid $5.00 per acre for this land. Petitioner is of course entitled to show that the amount received from the United States as a result of this purchase was grossly inadequate when compared to the fair market value of this land at the time it was taken. For this purpose the valuation date is June 29, 1917, the date of the presidential proclamation reserving the 253.04 acres of monument grounds.

Finally, the petitioner presses for compensation for what is designated as a "temporary taking" of some 18,111.62 acres of vacant lands that were ultimately returned to

tribal ownership in 1938. According to the petitioner this "temporary taking" of petitioner's land occurred between the time the lands, offered under the 1910 Act, were first proclaimed open for settlement, and when, never having been sold, they were returned to tribal ownership. Within this period of time, petitioner says the Indians "lost the right to the use and benefit of said land." The defendant contends that the bulk of the Fort Berthold reservation land returned to tribal ownership in 1938 consisted of timber land that had been reserved under the 1910 Act and never offered for sale to homesteaders. The balance, some 4,780 acres was land that had been offered for sale, but never sold, as well as land that had been sold but reverted due to cancellation and relinquishment of entries for failure to complete payments. From the evidence of record it appears that most of the land that was returned to tribal ownership was in fact reserved timber land that was never offered to homesteaders for sale and entry under the 1910 Act and subsequent acts. Without evidence to the contrary, the Commission can only surmise that these timber lands were reserved as intended under the 1910 Act for the sole benefit of the Fort Berthold Indians.

As to the 4,780 acres of available land that were offered for sale and entry to homesteaders but were not disposed of by 1938, the Commission is unable to agree with the petitioner that this in and of itself amounts to a "temporary taking" of said lands by the United States for which defendant is liable to the petitioner. First of all, under Section 14 of the 1910 Act the United States was not obligated to find purchasers for petitioner's surplus, unallotted, and unreserved lands. Secondly, there is no evidence in the record indicating that the United States, in total disregard and in breach of its fiduciary obligations under the 1910 Act, acted in such a contrary or negligent manner as to prevent, hinder, or discourage

sales of petitioner's land, nor is there any evidence of record indicating that the United States received some benefit from the mere fact that these lands never sold. On the contrary, the United States apparently took all reasonable steps to dispose of petitioner's land, and made sure that the petitioner was credited with partial payments plus interest on those tracts of land that originally sold but were subsequently relinquished for failure to complete payments. In this way the petitioner benefited by realizing some profit from the vacant lands that were eventually returned to tribal ownership. Finally, the United States was not obligated under the 1910 Act to purchase any of petitioner's surplus reservation land except the school lands in Sections 16 and 36, that had been granted to the State of North Dakota. For these reasons, we have found that there was never any "taking", temporary or otherwise of these vacant lands by the United States, and the petitioner is therefore not entitled to recover on this claim.

The Commission has concluded that with the exception of Royce Area 716 and the 160 acre St. Edward Mission tract, the petitioner herein has a compensable interest in the Fort Berthold Reservation lands that were disposed of under the 1910, 1914, 1917, and 1920 Acts of Congress. If the Indians are to prevail in this law suit, it is incumbent upon the petitioner in subsequent proceedings to prove that the moneys received from the sale and disposition of the subject lands under the several acts involved herein were so far below the fair market value at the time petitioner lost title thereto, that the United States was guilty either of fraudulent conduct or gross negligence amounting to a breach of its fiduciary obligations assumed under the 1910 Act and the subsequent acts involved herein. With this in mind it must be remembered that proof of a mere inadequacy between moneys paid and received for said lands and their then

fair market values as of the date of takings is not enough to prove fraudulent conduct on the part of the United States. *The Creek Nation* v. *United States*, 97 C. Cls. 591. The subject lands made available to homesteaders shall be valued as of the average date of the entries of each of the land offerings disposed of under the aforementioned acts, and the parties shall advise the Commission of the acerage sold, entered and patented under each of the aforementioned acts. The school lands granted to the State of North Dakota shall be valued as of the effective date of the 1910 Act and the Shell Creek Reservoir site and the Verendrye National Monument site shall be valued as of the effective dates said sites were reserved for public purposs.

Arthur V. Watkins
Chief Commissioner

We concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner

APPENDIX E

SIXTY-FIRST CONGRESS. SESS. II. CH. 264. 1910.

CHAP. 264.—An Act To authorize the survey and allotment of lands embraced within the limits of the Fort Berthold Indian Reservation, in the State of North Dakota, and the sale and disposition of a portion of the surplus lands after allotment, and making appropriation and provision to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause the unsurveyed part of the Fort Berthold Indian Reservation, in the State of North Dakota, to be surveyed, and to sell and dispose of, as hereinafter provided, all the surplus unallotted and unreserved lands within that portion of said reservation lying and being east and north of the Missouri River, and he shall cause an examination to be made of said lands by the Geological Survey; and if there be found any lands bearing coal or other mineral, the Secretary of the Interior is hereby authorized to reserve them from allotment or other disposition until Congress shall provide for their disposal: *Provided,* That any Indians to whom allotments may have been made within the area described herein may, in case they elect to do so before said lands are offered for sale, relinquish the same and select allotments in lieu thereof within the area in which the additional allotments hereinafter provided for are to be made.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause an allotment of one hundred and sixty acres of agricultural land or three hundred and twenty acres of grazing land to be made from the lands of the Fort Berthold Indian Reservation to each

member of the several tribes belonging to and occupying said reservation now living, such allotment to be in addition to any allotments heretofore made or which may be made under existing law: *Provided*, That all allotments made under this Act shall be made on that part of the reservation lying west and south of the Missouri River, or in townships one hundred and fifty north, of ranges ninety, ninety-one, ninety-two, and ninety-three west; townships one hundred and forty-nine north, of ranges ninety and ninety-one west; townships one hundred and forty-eight north, of ranges eighty-eight, eighty-nine, ninety, and ninety-one west; and townships one hundred and forty-seven north, of ranges eighty-seven, eighty-eight, eighty-nine, and ninety west, lying east and north of the Missouri River: *Provided further*, That all allotments of land in the townships specifically described and lying north and east of the Missouri River shall be made prior to a date to be fixed by the Secretary of the Interior, which date shall be not less than six months from and after the date of approval of this Act.

SEC. 3. That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions shall be maintained thereon for the benefit of said Indians; and he is hereby authorized to set aside and reserve such tracts in sections thirty and thirty-one, in township one hundred and forty-seven north, range eighty-seven west, and section thirty-six, in township one hundred and forty-seven north, range eighty-eight west of the fifth principal meridian as he may deem necessary to preserve the ruins of the old Fort Berthold Indian village and the Indian burial grounds adjacent thereto.

SEC. 4. That the Secretary of the Interior is hereby authorized to set aside and reserve such tracts as may be deemed necessary, not to exceed six hundred and forty

acres in the aggregate, for the purpose of establishing and maintaining a farm for the benefit of the members of the several tribes of Indians on the Fort Berthold Indian Reservation; and there is hereby appropriated, out of any money in the Treasury to the credit of the said Fort Berthold Indians, or which shall be placed to their credit from the proceeds of the sale of the lands disposed of as provided herein, not otherwise appropriated, the sum of twenty-five thousand dollars, or so much thereof as may be necessary to pay for the construction of the necessary buildings on said lands and for the purchase of necessary live stock, machinery, and equipment, and also to defray the expenses of operating said farm. The management and control of said farm shall be under the supervision of the Commissioner of Indian Affairs.

SEC. 5. That the Secretary of the Interior is hereby authorized to set aside and reserve from location, entry, sale, allotment, or other appropriation such tracts as are found to be chiefly valuable for power sites or reservoir sites: *Provided*, That the Secretary of the Interior is hereby authorized to cancel, after notice and a hearing, all trust patents issued to Indian allottees for allotments within any such power or reservoir site: *Provided further*, That the Secretary of the Interior shall report to Congress all lands so withdrawn for power or reservoir sites.

SEC. 6. That before any of the land is disposed of, as hereinafter provided, and before the State of North Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen and thirty-six, or any portions thereof, by reason of allotment thereof to any Indian or Indians, the Secretary of the Interior is authorized to set aside and reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into lots

and blocks and disposed of under such regulations as he may prescribe; and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town site; and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes, to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct; and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in the construction of schoolhouses or other public buildings or improvements in the town sites in which such lots are located. The net proceeds derived from the sale of such lots, less the amounts expended in the construction of schoolhouses or other public buildings or improvements, as hereinbefore provided, within the town sites aforesaid, shall be credited to the Indians as hereinafter provided.

SEC. 7. That the President of the United States shall appoint a commission, consisting of three persons, to inspect, classify, appraise, and value all of the lands described in section one of this Act that shall not have been allotted in sevaralty to said Indians or granted or reserved by the terms of this Act, said commission to be constituted as follows: One of the commissioners shall be a person holding tribal relations with said Indians, one a representative of the Interior Department, and one a resident citizen of the State of North Dakota. That within twenty days after their appointment said commissioners shall meet and organize by the election of one of their number as as chairman. The said commissioners shall then proceed to personally inspect and classify and appraise, in one hundred and sixty acre tracts, all of

the remaining lands described in section one of this Act, except sections sixteen and sections thirty-six. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands and necessary expenses, exclusive of subsistence, to be approved by the Secretary of the Interior; such inspection and classification to be completed within six months from the date of the organization of said commission.

SEC. 8. That when said commissioners shall have completed the classification and appraisement of all of said lands, and the same shall have been approved by the Secretary of the Interior, the lands shall be disposed of under the provisions of the homestead, mineral, and townsite laws of the United States, except as hereinafter otherwise provided and excepting sections sixteen and thirty-six of each township, which sections are hereby granted to the State of North Dakota for school purposes; and in case either of said sections or parts thereof should be lost to the State by reason of the allotment thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to select other unoccupied, unreserved, nonmineral lands, which selections must be made at least thirty days prior to the date fixed by the President's proclamation opening the surplus lands to settlement: *Provided*, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of

sections sixteen and thirty-six, or any part thereof, within the township in which the loss occurs, except in any township where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township: *Provided further*, That the United States shall pay to the said Indians for the lands in said sections sixteen and thirty-six, so granted, or the lands within said reservation selected in lieu thereof, the sum of two dollars and fifty cents per acre.

SEC. 9. That said lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars and Philippine insurrection, as defined and prescribed in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said agricultural lands shall be the appraised value thereof as approved by the Secretary of the Interior, and the agricultural lands shall be disposed of under the homestead law and shall be paid for in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal installments, to be paid in two, three, four, five, and six years, respectively, from and

after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: *Provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

SEC. 10. That the Secretary of the Interior is hereby authorized to set aside and reserve as a tribal forest reserve all timber lands, to be used by said Indians under the direction of the Commissioner of Indian Affairs.

SEC. 11. That the net proceeds derived from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States to the credit of the Indians belonging to and having tribal rights on said reservation, which shall draw interest at the rate of three per centum per annum; that all the moneys derived from the sale of said lands and deposited in the Treasury of

the United States to the credit of said Indians shall be subject to appropriation by Congress for their education, support, and civilization.

SEC. 12. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of North Dakota, and there is hereby appropriated the further sum of one hundred thousand dollars, or so much thereof as may be necessary, for the purpose of making surveys, appraisements, allotments, and classification provided for herein: *Provided*, That the latter appropriation, or any further appropriations hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes.

SEC. 13. That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for townsite purposes, granted to the State, or otherwise disposed of shall be subject to all laws of the United States prohibiting the introduction of intoxicants into the Indian country until Congress shall otherwise provide.

SEC. 14. That nothing in this Act contained shall in any manner bind the United States to purchase any of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this Act shall

be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreement not inconsistent with the provisions of this Act.

Approved, June 1, 1910.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2062

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

This case has been the subject of four prior decisions:

(a) The opinion of the Indian Claims Commission, entered on November 4, 1965 (Pet. App. D), reported at 16 Ind. Cl. Comm. 341;

(b) The opinion of the Court of Claims, entered on February 16, 1968 (Pet. App. C), reported at 182 C.Cls. 543 and 390 F. 2d 686;

(c) The opinion of the Indian Claims Commission, entered on August 2, 1972 (Pet. App. B), reported at 28 Ind. Cl. Comm. 264;

(d) The memorandum order of the Court of Claims (Pet. App. A) on which the writ is sought, which is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 29, 1974. The court's order denying petitioners' motion for rehearing was entered on May 31, 1974 (Pet. App. A, p. 6a). The petition for a writ of certiorari was filed on July 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

A 1910 Act of Congress authorized the sale of certain surplus Indian lands in North Dakota under the homestead laws at prices to be established by a commission appointed pursuant to the Act, the proceeds therefrom to be credited to the account of the Indians and to earn interest at three percent per annum. The prices so established were found by the Indian Claims Commission to be substantially below the fair market value of the lands.

The question presented is whether the government's sale of the homestead lands constituted a taking of the Indians' property for which just compensation was due, so that the interest rate on the difference between the sale price and market value should be five percent, or only a breach of the government's fiduciary duty to protect Indian property, in which event the interest rate on the same principal amount would be the three percent rate established by the 1910 Act.

STATUTE INVOLVED

The Act of June 1, 1910, 36 Stat. 455, is reproduced at Pet. App. E.

STATEMENT

The Three Affiliated Tribes of the Fort Berthold Reservation brought this action seeking, among other

things, to recover just compensation for certain tribal reservation lands in North Dakota allegedly taken by the United States.

In the Act of June 1, 1910, Congress, expressly stating that it was acting in a trustee capacity, undertook to allot certain lands on the Fort Berthold Reservation to members of the Three Affiliated Tribes of the Fort Berthold Reservation and to dispose of certain surplus unallotted lands. With regard to disposition of these surplus lands, the Act provided, *inter alia*, for sale under the homestead, mineral, and townsite laws at appraised prices to be determined by a three-man commission made up of one member of the Tribes, one representative of the Interior Department, and one resident of North Dakota. The Act provided that the net proceeds of the sale of lands under the Act shall be held to the credit of the Indians and shall draw interest at three percent per annum.

In 1951, petitioners filed the instant claim with the Indian Claims Commission pursuant to the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70 *et. seq.* In 1965, the Commission determined that, while the petitioners had a compensable interest in the lands disposed of pursuant to the 1910 Act, no Fifth Amendment taking had occurred (Pet. App. D). On an interlocutory appeal, the Court of Claims reversed in part (Pet. App. C). The court stated that no Fifth Amendment taking occurs if Congress, in transmuting tribal assets from land into money, makes a good faith effort to give the Indians the full value of their lands (Pet. App. C, p. 8c). Applying this test, the court held that

the lands sold for homesteads were not taken because Congress, by directing that the homestead lands be classified and sold at their appraised value, had made a good-faith effort to obtain full value of the lands for the Indians. Accordingly, the court held, petitioners could recover under the Indian Claims Commission Act only upon a showing that the homestead lands were sold for an amount so far below their fair market value as to result in a fraud, gross negligence or a breach of the government's fiduciary obligations to the Indians. The Court of Claims remanded the case to the Commission for determination of remaining issues, and review in this Court was not sought.

On remand, the Commission found, *inter alia*, that the homestead lands had been appraised and sold at such an undervalued price as to result in a breach of fiduciary duty. A total of $7,605,086 was awarded as damages for this alleged breach of fiduciary duty, representing the full principal amount of $2,765,067 plus interest at the three percent rate established by the 1910 Act, totaling $4,840,019 as of June 30, 1972 (Pet. App. B, pp. 22b, 35b). The Commission rejected, as contrary to the law of the case, petitioners' renewed claim that the sale of the homestead lands constituted a Fifth Amendment taking as to which interest should be calculated at the rate of five percent (*id.* at 18b–19b), which the Commission held in another connection to be applicable to such takings (*id.* at 22b–34b).

Petitioners appealed the Commission's decision and again contended that the 1910 Act constituted a Fifth

Amendment taking of the homestead lands. The government, on the other hand, argued that under the doctrine of the law of the case, the court should refrain from reopening issues decided in 1968. On March 29, 1974, the Court of Claims affirmed, saying that the decision of the Commission is "correct" (Pet. App. A, p. 2a). The court subsequently denied petitioners' motion for a rehearing and suggestion that the rehearing be *en banc* (Pet. App. A, p. 6a).

ARGUMENT

The petition presents only a narrow issue involving the proper characterization of a statute of limited scope, the only practical effect of which is on the interest rate applicable to the Commission's award.

1. The United States, in its role as trustee on behalf of the Indians, may have occasion to transmute trust lands into other forms of trust property. The government may also act in its sovereign capacity and take Indian lands for a public purpose, but when it does so it is obliged under the Fifth Amendment to render just compensation. The court below stated the legal standard for distinguishing between the two situations as follows (Pet. App. C, p. 8c):

> Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.

This formulation is in harmony with the relevant decisions of this Court. *United States* v. *Klamath and*

Modoc Tribes, 304 U.S. 119, 123; *Chippewa Indians* v. *United States*, 301 U.S. 358, 375–376; *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497; *United States* v. *Creek Nation*, 295 U.S. 103, 109–110. Petitioners' arguments are primarily directed, not against the standard itself, but rather against the manner in which the court below applied the standard to the homestead lands issue.

2. The court below properly determined that the homestead lands were not taken by the United States. Congress itself expressly stated that it was acting in its trustee capacity in this matter (Pet. App. E, p. 8e). By providing for classification and appraisal by a three-man commission, Congress made a practical effort to see that the Tribes obtained full value of their surplus lands. Accordingly, the Commission and the court properly declined to speculate as to Congress' alleged "true" motives in enacting the 1910 statute.

In any event, the question whether the Commission properly applied the governing legal standard to the facts in this case does not warrant further review.

3. There is no merit in petitioners' claim that they were improperly denied an opportunity to be heard on the question whether the homestead sale provisions of the 1910 Act constituted a Fifth Amendment taking, disposed of by the Court of Claims in its 1968 decision. At issue was the legal characterization to be

given to a particular Act of Congress. The statute itself (including the explicit assertion that Congress was acting "as trustee" for the Indians (Pet. App. E, p. 8e)), and the usual sources of legislative history available to the court, provided a sufficient basis for making the determination whether the 1910 Act was a good faith effort by Congress to care for the property of the Indians, rather than to take it. The additional extrinsic evidence proffered by petitioners concerning the true "motives" of sponsors of the 1910 Act was unnecessary and is normally irrelevant in such assessments of legislation. Cf., *e.g.*, *Fletcher* v. *Peck*, 6 Cranch 87, 130; *United States* v. *O'Brien*, 391 U.S. 367, 383–384; *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 462. Accordingly, petitioners cannot properly complain.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
WALLACE H. JOHNSON,
Assistant Attorney General.
EDMUND B. CLARK,
ROBERT L. KLARQUIST,
Attorneys.

SEPTEMBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974